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The sixteenth annual meeting of the American Bar Association will be held at Milwaukee, on Wednesday, Thursday and Friday, August 30th and 31st, and September 1st. In addition to the regular business programme, there will be an address by the President, John Randolph Tucker, of Virginia. Papers will be read by Henry Wade Rogers on "The Treaty-making Power," by W. W. MacFarland on the "Evolution of Jurisprudence," and by U. M. Rose on "The Law of Trusts and Strikes." There will also be reports from the Committees on Jurisprudence and Law Reform, Judicial Administration and Remedial Procedure, Legal Education and Admission to the Bar. The meeting promises to be a most interesting one.

The extremes of a legal position are well illustrated by the cases of Womack v. Western Union Telegraph Co., and Connell v. Western Union Telegraph Co., the former decided by the Supreme Court of Texas, the latter by the Supreme Court of Missouri. In the Texas case it is held that in an action to recover damages for delay in delivering a telegram sent by plaintiff, inquiring as to his lost child, the mental suffering of the parents, which would have been relieved if the message had been properly delivered, is a proper element of damages. In the Missouri case it is held that damages cannot be recovered for mental suffering caused by the non-delivery of a telegram, informing plaintiff of his child's dying condition, until after its death and burial. Since the decision of the Supreme Court of Texas in Stewart v. Telegraph Co., 66 Tex. 580, there has not been a doubt expressed by the courts of that State as to the right to recover damages for mental anguish. This, however, is the first case in which the question as to the liability of a telegraph company for such damages has been presented to the Missouri court, though the case of Trigg v. Railway Co., 74 Mo. 147, which was cited as an authority by the court, decided that in an action against a carrier of passengers, mere pain of mind unconnected with bodily injury is not a proper element of damage. The Texas rule has been followed in that State in a great number of cases and has been adopted in Indiana, North Carolina, Kentucky, Alabama and Tennessee. On the other hand, this new departure has been vigorously assailed and denied by the Supreme Courts of Mississippi, Georgia, Kansas, and in Dakota, and in a most luminous dissenting opinion by Judge Lurton, of the Supreme Court of Tennessee, now judge of the United States Circuit Court for the sixth circuit, in which Folkes, J., concurred. The majority of the Supreme Court of Tennessee do not go the length of some of the courts which have adopted the doctrine. The majority lay great stress upon the fact that by virtue of a statute in Tennessee a cause of action is given to the aggrieved party for damages. Hence they argue that, as the party has the right to some damages by virtue of the statute, they conclude they may add the anguish of mind as an element. It is impossible o escape the feeling that the very able judges were resorting to a fiction to justify them in supporting the action. It is impossible to read the opinion of the Missouri court in this latest contribution to the controverted question without being impressed with the idea that the Texas rule is a serious innovation upon the common law, and one which is of doubtful value.

The need of a revision of the United States Statutes is suggested by *Bradstreet's*. Such revision is greatly to be desired. It is now nearly twenty years since a revision was made—that by the forty-third congress in 1873, 1874 being the last. A new edition of the Revised Statutes was indeed prepared in 1878, but as the commissioner charged with the work said in the preface to this edition, it was not in any proper sense a revision of the statutes of the United States. The jurisdiction of the commissioner was strictly limited by the statute. He was directed to incorporate into the text of the first edition of the statutes all the amendments made since December 1, 1873, including those made by the forty-fourth congress, with marginal references to the acts of amendment and to the decisions of the United States courts, with like reference to all the statutes passed in the same period which in his opin-

ion might in any manner affect or modify any of the provisions of the first edition of the Revised Statutes. The commissioner was also directed to include certain important historical documents which were not printed in the first edition, but he was not clothed with power to change the substance or to alter the language of the existing edition of the statutes, nor to correct any errors or supply any omissions therein except as authorized by the several statutes of amendment, so that the work was not a real revision, but a new edition of a revision. Since the appearance of the edition of 1878 supplements have been issued, but they are, as we have before suggested, inconvenient in use and are now thoroughly antiquated. It is to be hoped that the congress which is about to convene will act in this matter and provide for a thorough and complete revision.

NOTES OF RECENT DECISIONS.

LIBEL—PRIVILEGED PUBLICATION—MERCANTILE AGENCY.—In Mitchell v. Bradstreet Co., 22 S. W. Rep. 358, decided by the Supreme Court of Missouri, it was held that a false publication by a commercial agency as to the solvency of a business firm it not privileged where the publication sheet is issued to all the subscribers of the agency without regard to their being creditors of the firm. Burgess, J., said:

Defendant's first contention is that the publication sheet was privileged, in the absence of motives, as to subscribers who were creditors of plaintiffs, and that the court erred in allowing the proof of publication to such subscribers. If the proof showed that no other persons than the creditors of plaintiffs had received the publication sheet in which the libelous matter is shown to have been published, there are authorities which hold that, in the absence of malice in the publication, owing to the confidential relations existing between such creditors and the defendant, the publication was privileged, and that defendant was not liable in damage therefor, although the same was false. In the case of Trussell v. Scarlett, 18 Fed. Rep. 214, it was held that, "when a mercantile agency makes a communication to one of its subscribers who has an interest in knowing it, concerning the financial condition of another person, and when such communication is made in good faith, and under circumstances of reasonable caution as to its being confidential, it is a protected, privileged communication, and an action for libel cannot be founded upon it, even though the information given thereby was not true in fact, and though the words themselves are libelous." See, also, Locke v. Bradstreet Co., 22 Fed. Rep. 771. But the answer in the case at bar admits, and the proof shows, that the publication sheet under consideration was not only sent to the creditors of plaintiffs, but was sent to all of the subscribers of defendant, regardless of their location or interest in the financial standing of plaintiffs. While it may be conceded that the business of defendant is a laudable one, and, in so far as it concerns the tradesmen, bankers, manufacturers, and business of the country, almost indispensable, it cannot be that when a company for hire—a moneyed consideration paid to them—makes a false statement or publication as to the financial standing of any person or persons or, business firm, sends it all over the country to persons who are not the creditors of any such person or firm, as well as to those who are, and ruins them in their credit and business, and then claims immunity from liability therefor upon the ground that such publication was privileged, we are not inclined to give our sanction to a doctrine which seems to us to be so harsh, and so unjust; and in this position we are sustained by courts of high authority. In the case of Pollasky v. Minchener, 46 N. W. Rep. 5, which was a suit against the agent of a commercial agency for libel, the Supreme Court of Michigan says: "The notification sheet containing the false statement respecting the acts of Pollasky Bros., was not alone sent to those who were dealing with them and extending them credit, but to between six and seven hundred subscribers in Michigan, and others residing out of the State, from some of whom they might wish to purchase goods upon credit, and this without any request being made to be informed of the standing or credit of Polasky Bros.; and others of whom, and by far the greater number, were engaged in different lines of business, and who were in no manner interested in knowing their standing or financial ability or business integrity, to all such the communication was not privileged. It cannot be said that a blacksmith, a saw-miller, and a lumber dealer, a furniture manufacturer, a dealer in hardware, a chemist, mineral water bottlers, butchers, book agents, physicians or druggists, or other business mentioned in the notification sheets, who are not engaged in wholesale or retail dealing in dry goods, clothing, or boots and shoes, are at all interested in the business standing of a dealer in dry goods, clothing, and boots and shoes. No court has gone so far as to hold all communications made by a mercantile agency to their subscribers, if made in good faith, but made generally, without request, or to those inquiring concerning or interested in knowing the condition and financial standing of a person, are privileged. On the contrary, courts have uniformly held that privilege does not extend to false publications made to persons who have no such interest in the subject-matter." Goldstein v. Foss, 2 Car. & P. 252; Com. v. Stacey, 8 Phila. 617; Taylor v. Church, 8 N. Y. 452; Ormsby v. Douglass, 37 N. Y. 477; Sunderlin v. Bradstreet, 46 N. Y. 188; King v. Patterson, 49 N. J. Law, 417, 9 Atl. Rep. 705; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. Rep. 753; Johnson v. Bradstreet Co., 77 Ga. 172; Erber v. Dun, 12 Fed. Rep. 526. "The law guards most carefully the credit of all merchants and traders. Any imputation on their solvency—any suggestion that they are in pecuniary difficulties—is therefore actionable without proof of special damages. Of merchants, tradesmen, and others in occupations where credit is essential to the successful prosecution, any language is actionable, without proof of special damages, which imputes a want of credit or responsibility or insolvency." Newell, Defam. pp. 192, 193, §§ 34, 35. In the case in hand the defendant was not even applied to by any of its patrons for information in regard to the financial standing of the plaintiffs, and the publication of the

statement that plaintiffs had assigned was merely voluntary on their part, false in fact, and compelled them to retire from business. When asked to retract the statement, they declined to do so. Under such circumstances, the statement was in nowise privileged. The information acquired by defendant was its own, and was communicated to others or made public in such form and upon such terms as it dictated. Neither the welfare nor convenience of society will be promoted by a publication of matters, false in fact, injuriously affecting the standing and credit of merchants and tradesmen, broadcast through the land, within the protection of privileged communications. While the defendant's business is lawful, yet in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to the like liability of others.

BANKS—INTEREST ON DEMAND—NOTE—PAYMENT IN ADVANCE—RECOVERY OF UNEARNED INTEREST.—The Supreme Court of Errors of Connecticut, in Shelly v. Bristol Savings Bank, hold that where a savings bank accepts interest in advance on a note payable on demand, it is *prima facie* evidence of an agreement to forbear collecting the note until the expiration of the time for which such interest is paid, and the maker cannot, on payment of the principal before the expiration of such time, recover back the unearned interest in the absence of an agreement by the bank to repay it. Andrews, C. J., says:

The argument of the plaintiffs is this: As their note is payable on demand, the bank had the unqualified right to demand payment or to bring a suit on it at any time, notwithstanding the interest had been paid in advance; that the bank might have brought a suit on the 7th day of April, and if it had done so, it would have been required to account for the interest which had been paid, but not earned, at that time, either to repay it or to apply it as part payment of the principal; and they say that their right to pay the note at any time is precisely the same as the right of the bank to demand payment, and that the same results follow, namely, that the bank must repay the unearned interest.

There can be no doubt that a savings bank may take interest in advance on a loan made by it, and reserve the right by agreement to bring a suit within the time for which interest had been paid. It was so decided in Crosby v. Wyatt, 10 N. H. 318. Such seems to have been the understanding in our own cases. Hubbard v. Callahan, 42 Conn. 524; Hayes v. Werner, 45 *Id.* 246, 252. In such a case, if the note was collected by a suit, it might be said that a promise was implied to return any excess of interest that had been paid, because the bank would thereby deprive the maker of the note of the use of the money a part of the time for which its use had been paid. So, too, there might be a promise by the bank to return unearned interest if the note should be paid by its maker. In the case before us there is no such promise unless it is found in the facts stated in the complaint. The payment by the plaintiffs of the $250 on the 1st day of January, 1892, a part of which it is sought to get back by this action, was in terms the payment of interest in advance. It is so averred in the complaint. It was an absolute payment, not a conditional one.

The plaintiffs, by their note, made two years before, had promised in writing for value received, to make payment of the interest for six months in advance. They had done so for two years. The payment on the 1st of January, 1892, was made in pursuance to that promise. At the time that payment was made neither the plaintiffs nor the defendants expected or desired that any part of it should ever be paid back. The defendant is a savings bank, engaged in the business of loaning money. It must obtain interest on its loans, that it may be able to pay interest to its depositors. It is an advantage to such a bank to have permanent loans. It is a matter of common knowledge that a savings bank rarely, if ever, collects a loan when secured, and the interest is paid. To have a loan paid is to such a bank an inconvenience and a loss.

It must be assumed that the plaintiffs understood this usage of the defendant. On the 7th day of April, 1892, the defendant was willing and desirous that the loan to the plaintiffs should remain. The plaintiffs, disregarding the wish of the defendant, insisted on making payment. It is presumed that the plaintiffs paid their note on that date, because they expected to secure an advantage to themselves by doing so. Their plan involved an advantage to themselves by imposing a loss on the defendant. These are not circumstances from which a promise by the defendant to repay any portion of the interest money can be implied. Implied promises grow out of the acts of parties when those acts, translated into words, are a promise. In such cases the parties are supposed to have made those stipulations which, as honest, fair and just men, they ought to have made. But these qualities never require a party to submit to a loss for the benefit of another.

The argument of the plaintiffs assumes that there was no contract by the defendant for forbearance. If this assumption is not correct, then their argument falls. Now it seems to us that the taking of interest in advance is a fact, in the absence of any contrary evidence, tending to show an agreement for forbearance. This precise question was fully and carefully considered by Parker, C. J., in Crosby v. Wyatt, 10 N. H. 322. He said: "Where an individual pays interest upon a note in advance he does so for the purpose of procuring delay, and it is believed that it is generally understood between the parties, unless there is some express reservation, that the creditor has no right to call for the principal until the expiration of the time. The payment of the interest is the consideration of such an agreement, implied from the transaction itself, if not distinctly expressed. The sum received is a payment, not as a part of the principal, or generally, but specially, as interest for a certain period. And why is this payment made? Clearly to obtain delay, and for nothing else. The very idea of a payment of interest in advance presupposes that delay of payment of the principal is to be given for the same. The interest thus paid is not expected to be applied afterward to the principal, or paid back on any contingency, unless there is some agreement of the parties to that effect. Nor are we aware of any principle upon which the maker, after such a payment of interest in advance, could, before the expiration of the time, on offering to pay the balance, require the creditor to apply any portion of the interest so paid in discharge of the principal. Should the creditor within the time commence a suit and obtain a judgment, no defense being made, the maker might perhaps recover back the interest for the unexpired

time; but that would be because the creditor had not performed what was incumbent on him, and the consideration of the payment had failed to that extent. Fuller v. Little, 7 N. H. 535. A payment of interest in advance furnishes a sufficient consideration of a contract to delay. Wheat v. Kendall, 6 N. H. 504, 508. As a general rule then the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment; and no suit can be commenced against the maker during the period for which the interest has thus been paid." These views were affirmed by the same court in Drew v. Towle, 30 N. H. 531, and approved in Bank v. Pearsons, 30 Vt. 714.

Other cases in various jurisdictions sustain the same doctrine. Bank v. Truesdell, 55 Barb. 602; Robinson v. Miller, 2 Bush, 179; Preston v. Henning, 6 *Id.* 556; Scott v. Saffold, 37 Ga. 384; Miles v. McLellan, 2 Nott & McC. 133; Gardner v. Gardner, 23 S. C. 593; Jarvis v. Hyatt, 43 Ind. 163; Abel v. Alexander, 45 *Id.* 523; Woodburn v. Carter, 50 *Id.* 376. The cases from Massachusetts and Maine hold that the reception of interest in advance is not of itself evidence of such a binding contract to extend the time of payment as to discharge a surety. Bank v. Lewis, 8 Pick. 458; Bank v. Hill, 10 *Id.* 129; Bank v. Bishop, 6 Gray, 317; Crosby v. Wyatt, 23 Me. 156. But these cases, when examined with care, are not inconsistent with the cases from New Hampshire and Vermont. In Bank v. Lewis it is stated that the bank, even though it had taken interest in advance, had retained the right to sue at any time. In Bank v. Hill the statement is that the payments of interest in advance were made with the understanding that if the bank should want money the note might be collected before the expiration of the time for which the interest had been paid. These two cases are the authority for all later cases in that State and in Maine. In the very latest case from Massachusetts (Bank v. Parsons, 138 Mass. 53) the court holds upon the facts stated that the bank reserved the right to sue at any time on the note. With the reservation of the right to collect the note at any time these cases harmonize with all the other cases cited.

DEED — ACKNOWLEDGMENT—IMPEACHMENT —FRAUD.—The Supreme Court of Alabama, in Grider v. American Freehold Land & Mort. Co., 12 South. Rep. 775, had before it, a very knotty question as to the power to impeach the acknowledgment to a deed. The holding was that where a grantor has appeared before an officer, and an acknowledgment is taken, the certificate of the officer, in due form, is conclusive of the facts certified, and which he is by law authorized to certify; but such certificate may be impeached for duress or fraud in which the grantee participated, or had notice of before parting with his money, and that when there has been no appearance of a married woman before the officer, and no acknowledgment made, such fact may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers. From the very long and exhaustive opinion of Head, J., we extract the following: After stating the general rule as to the conclusiveness of the certificate of the acknowledging officer he says:

In Halso v. Seawright, 65 Ala. 431, however, where the question was whether the clerk of the probate court was authorized to take and certify an acknowledgment, the act was held to be of a ministerial, and not judicial, nature, and that, therefore, the clerk was authorized. But in the later case of Griffith v. Ventress, *supra*, this court, without referring to Halso v. Seawright, declared it to be a judicial act, and this may now be considered as the established doctrine of this court. In Shelton v. Aultman & Taylor Co., *supra*, it was contended by counsel, upon the authority of Halso v. Seawright, that the decisions sustaining the conclusive character of the certificate should be overruled, arguing that as the officer acts in a ministerial capacity, as held in Halso v. Seawright, parol evidence should be admitted to falsify the certificate in any and every respect; but the court, speaking by Justice Clopton, said that, whatever may be the capacity in which the officer acts, the rule, as established, may now be regarded as a rule of property, which it would be unwise and unsafe to disturb. It must, therefore, as we have said, be considered as settled that where the grantor has appeared before the officer, and an acknowledgment of some kind has been taken, the certificate of the officer, in due form,—whether he acts ministerially or judicially,—is conclusive of the facts certified, and which he is by law authorized to certify: but the same may be impeached for duress or fraud in which the grantee or mortgagee participated, or had notice of before parting with his money.

We have examined a great many authorities and find only the following wherein the question we are now called upon to decide, viz: what effect shall be accorded to the officer's certificate when the allegation is that the party never in fact appeared before the officer, or made any acknowledgment at all? was raised or adjudicated. In Michener v. Cavender, 37 Pa. St. 334, the officer certified to the wife's acknowledgment. She in fact never appeared before him, or acknowledged the mortgage, in any manner. The mortgagee was innocent. The court, recognizing the general rule above stated, in cases where there was an actual acknowledgment, ruled that the wife was not bound by the certificate, and discussed at some length the rights, in such a case, of the mortgagee, as a *bona fide* purchaser without notice. The judge said, *inter alia:* "To call the mortgagee a '*bona fide* purchaser,' and put her to proof that he knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a forgery, out and out, and Cavender chose to invest his money in a purchase of it. Must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would therefore be worthless to the forger. Counterfeit note swould never be issued if a herald went before to proclaim their spuriousness. But, because they are taken without notice, do they become genuine? . . . To carry the doctrine of notice to such extent would subvert all law and justice. A purchaser of real estate, who finds the deeds in the channels of the title all duly acknowledged, is certainly not required to go up the stream, and inquire of every married woman if she executed her deed voluntarily, and acknowledged it according to

law, and if he pay his money on the faith of such title deeds he is to be protected; and this probably is all that was meant by what judges have said about purchasing without notice." In Allen v. Lenior, 53 Miss. 321, the wife signed, but never in fact acknowledged, the mortgage, or went before the officer, as his certificate affirms she did. Judge Campbell said: "We cannot escape the conclusion, after an earnest effort to avoid it, that the mortgage was never acknowledged by Mrs. Lenoir, and that the certificate that she had acknowledged it is untrue. A proper acknowledgment is an essential part of the execution of a conveyance of her land by a married woman. . . . The decree, being based on the mortgage, is erroneous." And in Johnston v. Wallace, *Id.* 331, the same judge adhered to this view, and upon a review of the authorities distinguished such a case from the case where an acknowledgment of some kind was made, but assailed because not made, in respect of its details, in the manner required by law. In Borland v. Walrath, 33 Iowa, 130, the wife neither signed nor acknowledged the mortgage, and the court held the certificate, which as to her was in due form, open to attack. The case, however, is unsatisfactory as authority on the point we are considering, since no allusion is made to the question of *bona fides* or notice on the part of the mortgagees, nor does it appear from the facts that he was a *bona fide* mortgagee without notice of the falsity of the certificate. In Smith v. Ward, 2 Root, 374, it was held, that parol evidence is admissible to prove that the grantor did not appear before the certifying officer and make acknowledgment; but, like the case last cited, the discussion is meager, and makes no reference to the rights of *bona fide* purchasers. In Meyer v. Gossett, 38 Ark. 377, the court held that where there is no appearance before the officer, and no acknowledgment in fact, the officer's false certificate of acknowledgment is void *in toto;* but the distinction was closely drawn that where there are an appearance and acknowledgment in some manner the certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition brought home to the grantee. It appeared that the grantee was a purchaser for value, without notice of the falsity of the certificate. That case was adhered to in Donahue v. Mills, 41 Ark. 421. In Williamson v. Carskadden, 36 Ohio St. 664, the general rule as to conclusiveness of the certificate is recognized, but the court say: "If it is true, as alleged by the defendants, · · · that they never appeared before the officer, or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and, in availing themselves of that defense, it is not necessary to show that the mortgagee had notice of such fraud. In fact, the governing principle is very broad. Thus it has been held that in an action on a recognizance, which is regarded as a record, a plea in bar that the defendant did not acknowledge the recognizance is sufficient; and however it may be as to the right to attack a judgment on the ground that there was no jurisdiction over the person, it is not denied that in a proper case a judgment may be directly impeached on that ground." In Mays v. Hedges, 79 Ind. 288, it was held that a certificate of ackuowledgment to a deed made by the officer, merely on the assurance of another that the party executed it, is a nullity. In Pickens v. Knisely, 29 W. Va. 1, 11 S. E. Rep. 932, we have a very full and ample discussion of this subject, upon a review of the authorities; and the conclusion reached was that the certificate of acknowledgment of a deed by a married woman may be impeached and avoided by proving that she never in fact appeared before the officer, or acknowledged the deed to him, and that this rule will be enforced against an innocent purchaser without notice. But if she appeared before the officer for the purpose of making the acknowledgment, and attempted to do in some manner what the law required to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers. In a dissenting opinion, Judge Green took strong ground against this conclusion. He maintained that the act of the officer is judicial, and likened it to the entry of a fine, and said: "It only remains to inquire whether if the entry on the record book of a court of general jurisdiction, and which court only could enter a fine, was that the married woman personally appeared before the court and acknowledged the fine in the appropriate manner, she could by parol evidence contradict this statement on the record book. I think it well settled that she could no more contradict the statement on the record that she personally appeared before the court than she could contradict the further statement on the same book of such court that she acknowledged the fine in the proper manner." In line with this dissenting opinion, Kerr v. Russell, 69 Ill. 666, held that the statute authorizing certain officers to take the private acknowledgment of a wife to a conveyance is a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand may be guarded, and on the other the rights of the grantee may be assured; that as a fine and recovery at common law were subject to impeachment for fraud, so the certificate of acknowledgment of a deed by a wife may be impeached, but the proof to sustain such a charge must be of the clearest, strongest, and most convincing character, and by disinterested witnesses that an innocent purchaser of land has a right to rely upon the record of a deed which shows upon its face that the wife has executed and properly acknowledged the deed with her husband; and the wife will not be allowed to avoid the same as to such purchasers without notice by showing her signature to be a forgery, and that she never in fact acknowledged the same. The court, in the opinion, discuss the subject at length, and give strong and cogent reasons for the decision. There are other Illinois cases in support of this. Graham v. Anderson, 42 Ill. 514; Lickman v. Harding, 65 Ill. 505; Dock Co. v. Russell, 68 Ill. 426. In Barnett v. Proskauer, 62 Ala. 486, the wife neither signed nor acknowledged the mortgage assailed, but the husband, without her knowledge or consent, signed her name, and made the acknowledgment. It does not appear whether the mortgagee was a *bona fide* purchaser without notice of the actual non-execution of the mortgage by the wife, and falsity of the officer's certificate, or not. That question was not raised. In the opinion, Brickell, C. J., said: "The certificate of acknowledgment, or proof of probate, taking the places of proof by the subscribing witnesses, or of the handwriting of the grantor, may also be contradicted, and parol evidence is admissible to falsify it. It is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution." And it was held the wife

was not bound. In Cahall v. Association, 61 Ala. 232, it is said, *obiter dictum:* "The certificate of the notary could not be impeached without showing the signature of the wife was forged, or that she was subjected to duress, or that fraud was practiced on her, with the knowledge of the grantee." In Shelton v. Aultman & Taylor Co., 82 Ala. 315, 8 South. Rep. 232, Justice Clopton, speaking for the court, construed the language we quoted above from Barnett v. Proskauer, 62 Ala. 486, to mean that, as to the execuiton of the conveyance, the certificate may be disproved in all cases, and in the opinion he said: "The rule settled by the decision is that as to all matters, except the execution of the conveyance, the certificate, when substantially conforming to the statute, is conclusive, unless impeached by allegation and clear proof of fraud or imposition practiced on the wife, in which the officer or grantee participated." In that case, it may be seen, there was no question raised as to the actual signing of the conveyance by the wife, or the total want of an acknowledgment by her. The objection made was that she was not examined separate and apart from the husband. So that the distinction drawn by the judge between the execution of the conveyance and other matters may be said to be dictum merely. Moreover, we think the judge misinterpreted the language of Barnett v. Proskauer. It was, we think, a mere statement of the burden of proof as to the fact of execution, when that fact was the matter in issue. The language was: "The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution."

From the foregoing review of the authorities, we must realize that the question we are called upon to decide is by no means free from difficulty. We know the absolute and implicit faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them; yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another.

NEGLIGENCE—DIRECTING VERDICT—QUESTION FOR THE JURY.—In Parish v. Williams, 55 N. E. Rep. 74, decided by the Supreme Court of Iowa, it was held, in an action against a blacksmith for personal injuries caused by a "spawl" from defendant's hammer striking plaintiff's eye, it being alleged that defendant was negligent in working at an anvil opposite his shop door and six feet away from the sidewalk, that it was error to direct a verdict for defendant, as there was evidence by experienced blacksmiths that "spawls" frequently fly from their hammers, and go a long distance, and sometimes inflict serious wounds, and that they cannot control their direction. The court said, *inter alia:*

In this case this plaintiff in passing along the sidewalk is struck by a spawl with such force as to penetrate the lid of the eye, the injury resulting in its destruction. If we are to sustain the action of the court, the effect of our holding will be to say that the anvil may be kept there, as a matter of law, and that passers-by are to take the chances against other like occurrences. We are not aware of any case where such a rule has been sustained. We notice a single case, cited by appellee, to indicate the line of authorities relied upon to sustain the ruling of the court. It is that of Losee v. Buchanan, 51 N. Y. 476. By the explosion of a boiler the pieces were thrown onto the premises, and into the buildings of plaintiff. Plaintiff claimed a right of recovery, even without negligence, on the ground that the casting of the pieces onto his premises was in the nature of a trespass, and that a right of recovery should be the same as in case of wrongful entry. The court refused to sanction such a rule, and rightly so, holding that negligence must be shown, to justify a recovery. The court used this language: "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damages they accidentally and unavoidably do my neighbor. • • • I hold my property subject to the risk that it may be unavoidably and accidentally injured by those who live near me; and as I move about upon the public highways, and in all places where other persons may lawfully be, I take the risk of being accidentally injured in my person by them without fault on their part." It is further said in the opinion: "I have so far found no authorities and no principles which fairly sustain the broad claims made by plaintiff (stated *supra*) that the defendants are liable in this action, without fault or negligence on their part to which the explosion of the boiler could be attributed." The gravamen of the complaint in this case is negligence, and there is no attempt at a recovery upon any other ground. It is said in argument—with a view, evidently, to bring it within that case—that there is no claim that the blacksmith shop is a nuisance. Not, perhaps, in specific terms, but the averments, if true, making the manner of its operation dangerous to the public safety, render a nuisance, and the distinction between the cases is to be maintained throughout. We hold it to be purely a question of a right of recovery on the ground of negligence, and we are clearly of the opinion that the state of the evidence is such that the case should have been submitted to the jury.

WHAT IS LEGAL CRUELTY?

"The definition of cruelty has puzzled the most eminent judges," said the court in Williams v. Williams, 23 Fla. 325, and the truth of this observation is fully borne out by the widely variant conclusions reached by the courts on the subject. Many and diverse are the views expressed by courts and judges as to what constitutes extreme cruelty sufficient

to warrant a divorce. In no other branch of the law, perhaps, is there greater diversity of judicial opinion. Courts are not even consistent with themselves on this subject. Whether this is the result of a fundamental defect of reasoning, or the inherent difficulty of the subject, we know not, but in some of the cases the reasoning does not seem entirely satisfactory. The Century and Webster agree as to the definition of cruelty. School children talk about it and seem to understand each other, but when learned judges discuss the question they subtilize and refine until they become puzzled indeed.

Much of the difficulty is caused by the application of arbitrary tests. Cruelty is a relative term, depending on the circumstances peculiar to each case, and its meaning cannot be empaled on a pin point, or circumscribed within the purview of set phrases, by the application of arbitrary rules. To say that two slight blows is extreme cruelty, as matter of law, when in fact it is not, and that conduct unattended with physical violence is not cruelty, when in fact it is, is a species of reasoning difficult to understand. The courts are entirely harmonious that personal violence, when of sufficient severity, constitutes extreme cruelty. There is no disagreement as to that proposition. The disagreement arises as to whether, when, and under what circumstances, extreme cruelty may be inflicted short of personal violence. Here there is a wide divergence of judicial opinion; and we find the authorities, like Swiss soldiers, fighting on both sides. The authorities will be considered under three heads:

1st. Those holding that extreme cruelty can only be inflicted by personal violence.

2d. Those holding that words of menace, inducing a reasonable apprehension of personal violence, may constitute extreme cruelty, though no personal violence has been used.

3d. Those holding that any course of conduct, subversive of the marital relation, may be extreme cruelty, though no personal violence has been used or threatened.

I. *Personal Violence.* — In some of the States, and perhaps in one or two sporadic cases in England, it has been held that extreme cruelty could only be committed by acts of personal violence intentionally inflicted.[1] In the view of these authorities, no apprehension of danger, however reasonable, or imminent, no mental suffering, however agonizing or excruciating, would constitute extreme cruelty, unless attended with personal violence. But it must be conceded that there is a plentiful lack of harmony in the courts holding this view, not only with themselves, but with each other. And the learned reader must not conclude when we cite authorities from the Massachusetts and Illinois courts on all sides of the question, that we are reckless in the citation of authorities. In Hill v. Hill, *supra*, it was held that threats of violence without assault were not a cause for divorce. In Warren v. Warren, *supra*, Parsons, C. J., said: "Extreme cruelty means personal violence and answers the *savitia* of the civil law." But it seems that the Massachusetts court in this case gave a much too restricted meaning to the term *savitia* of the civil law. By the civil law, any conduct on the part of the husband, accompanied by words of menace, creating a reasonable apprehension of bodily harm, was *savitia*.[2] In Ford v. Ford, *supra*, it was held that extreme cruelty could only be committed by personal violence intentionally inflicted. But in Bailey v. Bailey,[3] Chapman, J., said: "There may be personal violence which does not amount to cruelty, and there may be cruelty without personal violence.[4] But in Lyster v. Lyster,[5] the doctrine of the Ford case is adopted, and the court repeats that there must be personal violence to constitute extreme cruelty. The question, however, came up again in Cowles v. Cowles,[6] and the Bailey case was cited with approval. The same want of harmony is found in the Illinois cases. In Vignos v. Vignos and Birkby v. Birkby, *supra*, it was held that threats of personal violence were not sufficient. But in Harmon v. Harmon,[7] it is said that threats

[1] Hill v. Hill, 2 Mass. 150; Warren v. Warren, 3 *Id.* 321; French v. French, 4 *Id.* 587; Ford v. Ford, 104 *Id.* 198; Lyster v. Lyster, 111 *Id.* 327; Birkby v. Birkby, 15 Ill. 120; Vignos v. Vignos, 15 *Id.* 187; De La Hay v. De La Hay, 21 *Id.* 254; Embre v. Embre, 53 *Id.* 394; Henderson v. Henderson, 88 *Id.* 248; Fritz v. Fritz, 138 *Id.* 436.

[2] Mason v. Mason, 1 Edw. (N. Y.) 278; Hair v. Hair, 10 Rich. Eq. 163; Bareere v. Bareere, 4 Johns. Ch. 187; Holden v. Holden, 1 Hagg. 453; Westmeath v. Westmeath, 2 Hagg. Supp. 1.

[3] 97 Mass. 381.

[4] See also, Ridge v. Ridge, 3 Met. 257.

[5] 111 Mass. 327.

[6] 112 Mass. 298.

[7] 16 Ill. 85.

which raise a reasonable apprehension of bodily harm are sufficient. But in Embre v. Embre, *supra*, it was said: "Cruelty must consist of physical violence, abusive words, menaces or indignities not sufficient." The Embre case is repudiated, however, by the case of Coursey v. Coursey,[8] where the court said that threats of violence, inducing a reasonable apprehension of bodily harm, may be cruelty. The Coursey case is repudiated by the case of Henderson v. Henderson,[9] where the court said: "All the courts have held that there must be bodily harm and not mental suffering." The Henderson case is repudiated by the case of Ward v. Ward,[10] where the court said: "Threats of physical violence and false charges of adultery maliciously made are competent evidence to prove cruelty." The Ward case is repudiated by the case of Fritz v. Fritz,[11] where the court concludes that it requires two acts of physical violence to constitute extreme and repeated cruelty. In Mississippi, by virtue of the Code, cruelty must consist of acts "marked by personal violence."[12]

II. *Apprehension of Personal Violence.*—All the authorities, except those cited under the preceding head, hold to the view that a reasonable apprehension of personal violence, rendering the continuation of cohabitation unsafe, may be legal cruelty. But the distinctive feature of the class of cases now under consideration is, that they refuse to recognize that extreme cruelty may be inflicted by conduct which operates upon the mind only, causing mental suffering and consequent ill-health, unless such conduct consists in acts of physical violence or menaces or threats which induce a reasonable apprehension of bodily harm.[13] The principle clearly deducible from the authorities here cited is, that extreme cruelty can only be inflicted by acts of physical violence, or by menaces inducing a reasonable apprehension of such violence. "Words of insult, however galling, are not sufficient. But words of menace importing actual danger of bodily harm are sufficient," said Lord Stowell in the case of Oliver v. Oliver, *supra*. And this is a succinct statement of the doctrine. It follows that false and humiliating charges of adultery, bad temper, indolence, jealousy and abusive language, in the view of these authorities, are not sufficient to constitute cruelty, unless accompanied by personal violence or threats of bodily hurt, together with unmistakable evidence of an intention to carry them into execution.[14] But such conduct may serve to characterize and give poignancy to threats, or slight acts of physical violence.[15] So for the husband to call the wife a "damned fool," "damned liar," a "sloomey," an "Irish biddy," and tell her to "kiss an unmentionable part of the body," do not constitute cruelty, but may serve to give *animus* to acts of violence.[16] So the practice of masturbation in the presence of the wife, is not cruelty, though such disgusting conduct may impair the health of the wife.[17] Neither is aggravating conduct or habitual drunkenness.[18] So where the husband, in the absence of the wife, slept with the servant in wife's bed-chamber, and had sexual intercourse with her, this was held not to be an indignity amounting to cruelty. The court concluding its opinion denying the divorce, said:

> "Be to his faults a little blind,
> Be to his virtues ever kind,
> And clap your padlock on his mind."[19]

[8] 60 Ill. 186.
[9] 88 Ill. 248.
[10] 103 Ill. 477.
[11] 138 Ill. 436.
[12] 57 Miss. 530.
[13] Kirkham v. Kirkham, 1 Hagg. 409; Chesnut v. Chesnut, 1 Spinks, 196, 28 Law & Equity 603; Oliver v. Olive, 1 Hagg. 361; Evans v. Evans, 1 Hagg. 35; Curtis v. Curtis, 1 S. & T. 192; Milford v. Milford, 1 L. R. D. 269; Reeves v. Reeves, 3 S. & T. 139; Thornberry v. Thornberry, 2 J. J. Marsh. 322; Hawkins v. Hawkins, 65 Md. 104; Smeadly v. Smeadly, 30 Ala. 714; Wood v. Wood, 80 Ala. 254; Moyler v. Moyler, 11 Ala. 620; Hashall v. Hashall, 51 Md. 74; Daiger v. Daiger, 2 Md. 336; Ruckman v. Ruckman, 58 How. (N. Y.) 278; Barreere v. Bareere, 4 John. Ch. 187; Perry v. Perry, 2 Paige, 502; Harmon v. Harmon, 16 Ill. 85; Coursey v. Coursey, 60 Ill. 186; May v. May, 62 Pa. 210; Miles v. Miles, 76 Pa. St. 357.
[14] Falmar v. Falmar, 69 Ala. 84; Mason v. Mason, 131 Pa. 161; Holyoke v. Holyoke, 78 Me. 411; Kennedy v. Kennedy, 73 N. Y. 369; Smallwood v. Smallwood, 2 Swab & T. 397; Harding v. Harding, 22 Md. 337; Cheatum v. Cheatum, 10 Mo. 296.
[15] Forham v. Forham, 73 Ill. 498; Kennedy v. Kennedy, *supra;* Smith v. Smith, 40 N. J. 599; Wallermier v. Wallermier, 110 N. Y. 134; Allen v. Allen, 31 Mo. 479, and cases cited under third head.
[16] Goodrich v. Goodrich, 44 Ala. 670.
[17] 141 Mass. 495.
[18] Shut v. Shut, 71 Md. 193; Waskam v. Waskham, 31 Miss. 154; Brown v. Brown, L. R. 1 Pro. & Div. 46; Mason v. Mason, 1 Edw. Ch. 284.
[19] Miller v. Miller, 78 N. C. 102.

The same conclusion was reached in an English case, on a similar state of facts, except the wife had no padlock.[20] So for either spouse to deny to the other the right of sexual intercourse is not cruelty or desertion.[21] The reasons given by the courts for this doctrine, debarring conduct operating on the mind alone, other than threats, as a means of inflicting cruelty, are as diverse as the decisions are contradictory. Lord Stowell gave as a reason in the celebrated case of Evans v. Evans, *supra*, that the court had no scale of sensibilities by which it could gauge the quantum of injury done in such cases. Another judge said: "Courts cannot grant divorces out of pity for suffering."[22] And in another case the wife was admonished to suffer in silence "rather than place herself and her companion in the undefined and dangerous situation of a husband without a wife, and a wife without a husband."[23] We suppose this means, if it means anything, that it is better for the wife to bear the ills she has with a husband, than to fly to others she knows not of without a husband. The reason given by Lord Stowell is the one generally accepted in support of this doctrine.[24]

III. *Conduct Operating on the Mind—Mental Suffering.*—The authorities under this head give to the term extreme cruelty a wide, liberal and comprehensive signification. Here cruelty is considered cruelty, by whatever means inflicted. Any unjustifiable conduct on the part of either spouse, which grievously wounds the mental feeling of the other, or so utterly destroys the peace of mind of the other, as to seriously impair health or endanger the life of the other, may be extreme cruelty, although no physical violence has been used or threatened.[25] Words of indignity are as potent as blows, if they inflict pain to the extent of impairing health, rendering the continuance of cohabitation unsafe. "I will speak daggers to her but use none," said Hamlet. "There are many ways," said the court in Crichton v. Crichton,[26] "by which a cruel husband may break his wife's heart, and make life a burden to her without breaking her head." So frequent public aspersions by husband of a virtuous wife, charging her with unchastity, incest, or denying paternity of children born to them, may be extreme cruelty.[27] But such charge would not amount to cruelty if it proceed from an ebullition of passion or where wife gives cause to suspect.[28] And the authorities are quite uniform that false charges of adultery or other wrongful conduct, unattended with proof of physical violence, seldom, or never constitute extreme cruelty, unless they go to the extent of impairing health.[29] So compelling the wife in bad health to submit to excessive sexual intercourse is cruelty.[30] So

[20] Cousen v. Cousen, 4 S. & T. 164. But see *contra*, cases cited under third head.

[21] Cousen v. Cousen, 4 S. & T. 165; Cowles v. Cowles, 112 Mass. 298; Eshbad v. Eshbad, 23 Pa. St. 345; Holyoke v. Holyoke, 78 Me. 411; Magill v. Magill, 3 Pitts. Pa. 25; Segalbaum v. Segalbaum, 39 Minn. 258; Stewart v. Stewart, 78 Me. 548; Steele v. Steele, 1 McAuthur D. C. 505; Southwick v. Southwick, 97 Mass. 327; Reid v. Reid, 21 N. J. 331; Fritts v. Fritts, 138 Ill. 436; Stevens v. Stevens, 8 R. I. 557.

[22] Stevens v. Stevens, 8 R. I. 557.

[23] Lawrence v. Lawrence, 3 Paige, 267.

[24] Thornberry v. Thornberry, 2 J. J. Marsh. 322.

[25] Carpenter v. Carpenter, 30 Kan. 713; Avery v. Avery, 33 Kan. 1; Gibbs v. Gibbs, 18 Kan. 420; Butler v. Butler, 1 Pars (Pa.) Sel. Cases, 344; Jones v. Jones, 62 N. H. 464; Uhlman v. Uhlman, 17 Abb. N. Cas. 198; Harrett v. Harrett, 7 N. H. 196; Williams v. Williams, 23 Fla. 325; Rice v. Rice, 6 Ind. 100; Reed v. Reed, 4 Nev. 49; Latham v. Latham, 30 Gratt. 307; Wheeler v. Wheeler, 53 Iowa, 511; Carothers v. Carothers, 18 Iowa, 266; Menser v. Menser, 83 Mich. 319; McClung v. McClung, 40 Mich. 494; Kelly v. Kelly, 18 Nev. 49; Briggs v. Briggs, 20 Mich. 34; Donald v. Donald, 21 Fla. 325; Myrick v. Myrick, 67 Ga. 772; Glass v. Wyman Exc., 79 Ga. 319; Gholson v. Gholson, 31 *Id.* 634; Odam v. Odam, 36 Ga. 286; Mylton v. Mylton, 37 *Id.* 771; Freeman v. Freeman, 31 Wis. 236; Waltchaltz v. Waltchaltz, 75 Wis. 381; Bailey v. Bailey, 97 Mass. 381; Ward v. Ward, 103 Ill. 477; English v. English, 12 C. E. Green (N. J.), 529.

[26] 73 Wis. 60.

[27] Kelly v. Kelly, 18 Nev. 49; Lyle v. Lyle, 86 Tenn. 372; Powelson v. Powelson, 22 Cal. 358; Jones v. Jones, 60 Tex. 457; Eastman v. Eastman, 74 Tex. 474 (by virtue of code in Texas); Graft v. Graft, 76 Ind. 136; Eastes v. Eastes, 79 Ind. 363; Smith v. Smith, 8 Oreg. 101; Wagner v. Wagner, 36 Minn. 239; William v. William, 23 Fla. 325, where the charge was incest; Palmer v. Palmer, 45 Mich. 150, where charge was adultery in presence of children; Goodman v. Goodman, 26 Mich. 417, where charge was bigamy; Jones v. Jones, 62 N. H. 464, where a charge was adultery with children's tutor; Durant v. Durant, 1 Hagg. 733, denying paternity of children; Nadra v. Nadra, 79 Mich. 591, where wife charged husband with adultery. Whitmore v. Whitmore, 49 Mich. 417, considered an indignity; Cable v. Cable, 2 Jones' Eq. 392; Sheel v. Sheel, 2 Sneed, 716; Thomas v. Thomas, 2 Cold. 123, where the charge was a whore; Wheeler v. Wheeler, *supra;* Black v. Black, 3 Stew. (N. J.) 215; Whispell v. Whispell, 4 Barb. 217.

[28] Kennedy v. Kennedy, 73 N. Y. 369; Boon v. Boon, 12 Oreg. 437; Wagner v. Wagner, 36 Minn. 239; Skinner v. Skinner, 5 Wis. 451.

[29] Jones v. Jones, 62 N. H. 464; McKee v. McKee, 77 Iowa, 464; Beebe v. Beebe, *Id.* 133; Waldron v. Waldron, 85 Cal. 252.

[30] Walsh v. Walsh, 61 Mich. ; Melvin v. Melvin,

where a husband recklessly or knowingly communicates to his wife a veneral disease.[31] Cruelty to children in presence of wife held to be cruelty to wife.[32] So where the husband attempted to debauch a servant girl it was held to be cruelty.[33] Finally, the general result of the authorities under this head is, that legal cruelty may be inflicted by any willful conduct, which causes bodily harm, impairs health, or renders the continuance of cohabitation unsafe. JAMES C. COURTNEY.

58 N. H. 569; Moores v. Moores, 1 C. E. Green (N. J.), 276; Mayhew v. Mayhew, 61 Conn. 233, when catamenia were upon the wife; English v. English, 12 C. E. Green (N. J.), 71; English v. English, 27 N. J. Eq. 579. But see Shaw v. Shaw, 17 Conn. 189.

[31] Halthoefer v. Halthoefer, 42 Mich. 643; Cook v. Cook, 32 N. J. Eq. 476; Long v. Long, 2 Hawks, 189; Cook v. Cook, 5 Stewart, 476; Canfield v. Canfield, 34 Mich. 519; N. v. N., 3 S. & T. 234; Collett v. Collett, 1 Cur. 686; Morphett v. Morphett, 1 P. & D. 702; Bordman v. Bordman, 1 L. R. 233.

[32] Friend v. Friend, 53 Mich. 545; Perry v. Perry, 1 Barb. Chan. 516; Zugate v. Zugate, 1 S. & T. 491; Sant v. Sant, 10 Eng. Rep. 101; Bramwell v. Bramwell, 3 Hagg. 618.

[33] Popkin v. Popkin, 1 Hagg. 733, note *a*; Anthony v. Anthony, 1 S. & T. 549. But see *contra*, Cline v. Cline, 10 Oreg. 474. See also, Davis v. Davis, 86 Ky. 32.

MUNICIPAL CORPORATIONS—ICE ON SIDEWALKS—LIABILITY FOR INJURIES — CONTRIBUTORY NEGLIGENCE.

HAUSMAN V. CITY OF MADISON.

Supreme Court of Wisconsin, May 2, 1893.

1. Where the snow on a building melts in a sudden thaw, drips upon the sidewalk and freezes, and there is nothing unusual in the construction of the building or sidewalk, the city is not liable for injuries received by slipping on the walk.

2. In an action against a city for injuries received by falling on an icy sidewalk in the daytime, where it appeared that the snow on an adjoining building melted in a sudden thaw and froze on the walk; that plaintiff has previously seen ice form there in the same way; that there was nothing to prevent his seeing the ice if he had looked; and that there was room to pass without stepping on the ice—he was guilty of contributory negligence.

ORTON, J.: This action is brought to recover damages for a personal injury to the plaintiff, caused by the defective condition and want of repair of a sidewalk of said city. At the close of the testimony for the plaintiff the circuit court granted a nonsuit on the motion of the defendant. The grounds of the motion were that there was no negligence on the part of the city shown, and that there was contributory negligence on the part of the plaintiff shown by the evidence. Of course, either one or the other of these grounds, sustained by clear and satisfactory testimony, would be sufficient to justify the nonsuit. In an action for negligence a nonsuit is proper only when the inference of contributory negligence on the part of the plaintiff, or of the absence of negligence on the part of the defendant, is deducible from the undisputed facts and circumstances proved. Hoye v. Railway Co., 62 Wis. 666, 23 N. W. Rep. 14. From the facts established by the indisputable evidence we are satisfied that under this rule the defendant, in respect to this ice on the walk, was not guilty of any culpable negligence, and that the plaintiff contributed to his own injury by his want of ordinary care. Without detailing the testimony, the facts established by it appear to be as follows: On the 26th day of January, 1892, between 9 and 10 o'clock in the forenoon, the plaintiff, without any special business, and not hurried, was walking along the walk on South Blair street of the city, near the place of business of Warren & Sorenson, until he came to a place where there was ice a few feet wide on the walk, which was an inch or two thick where travelers walked and some thicker next to the adjacent building, and gradually run out about the middle of the walk, or perhaps nearer the outside of the walk. It was nearly level, and was not piled up, except near the building. On this ice he slipped and fell, and broke his left arm. The ice at that place was caused by the melting of ice and snow on the roofs and in the gutters of that building, which was one story in front and two in the rear, during the day, and spattering down on the walk; and at night it froze up and made this patch of ice. This was usual in the winter, and there were other similar places on the walks, and from a similar cause. There was nothing in the construction of the building or in its condition upon which any culpable negligence of its owner or of the city could be predicated. The walk at that place had a slope lengthways, according to the established grade of the street, and an inclination of a few inches toward the gutter, but only such as is common with all sidewalks properly constructed. From the description by the several witnesses of this ice it appears to have been formed by the melted snow and ice on the adjacent building, by the warmth of the day, spattered or sprinkled down on the walk next to the building, and towards night, and at night, by freezing as it fell, and making naturally thicker ice near the building, and the water running off towards the gutter, the ice became thinner and thinner, until it was stopped running by freezing near the middle of the walk. Its average thickness could not have exceeded an inch. From this description any one may be reminded of many similar places on the walks in the winter. If it should be held that it was the duty of the city to remove the ice from all such places on the walks in the winter, it would be a duty of impossible performance, with all the manual labor and machinery within its command. The gutters and pipes of buildings are liable to freeze up in this latitude in the winter, and the melting snow and ice, caused by the

heat of the sun in the day-time, will naturally and necessarily fall over the eaves and down on the walks, and run off into the gutters of the streets. At the freezing time of the evening it will be arrested in its flow, and congealed with the same descent or inclination of the walks—thicker where it falls, and growing thinner, until it ceases to run at this place, about the middle of the walk. These conditions are produced by natural causes, or the operation of the laws of gravitation and temperature. Such places may be defects in the walks, but they are natural and common defects, for which the municipality is not responsible. They are unpreventable and irreparable. As said in Taylor v. City of Yonkers, a late case in New York (11 N. E. Rep. 642): "It often happens that a fall of rain of the melting of adjoining snow is suddenly followed by a severe cold, which covers everything with a film, or layer of ice, and makes walks slippery and dangerous. This frozen surface is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting the result." Our own cases are sufficient authority for holding that the presence of such ice on the walk is not a defect for which the city is liable. Grossenbach v. City of Milwaukee, 65 Wis. 31, 26 N. W. Rep. 182; Schroth v. City of Prescott, 63 Wis. 652, 24 N. W. Rep. 405; Cook v. Milwaukee, 27 Wis. 192. The cases cited by the learned counsel of the appellant are not applicable. There is no evidence that this ice was piled up so as to make it oval or uneven, except close to the building, where a pedestrain would not walk. I think we can say that there is no evidence whatever of the culpable negligence of the city for not preventing or removing this layer of ice on the walk. For that reason alone the trial court was warranted in granting the nonsuit.

On the other ground for the nonsuit—of the contributory negligence of the plaintiff—very little need be said, as the evidence is very short, and to the point. The plaintiff testified that at this time he was not employed, and was laying off, and walking around. At this time he was on his way towards the depot, and was walking right along. He saw the walk ahead of him, and looked at it. He was looking at the sidewalk strait ahead. His attention was not diverted, and he was not looking away. He could see that walk just as well as he could then see the floor (in the room where he was examined). He did not notice the ice on the walk. He resided in the same block where the ice was, and had passed the same place often before, and saw how the ice was formed by the water spattering down from the roofs, and had seen the ice there and in several other places on that walk. From his own testimony there cannot be the least question but that the plaintiff slipped and fell on this ice through his own want of ordinary care. He knew all about it, and how it was formed, and passed the place nearly every day going to the depot to see the trains come in, and looked at the walk right ahead of him at this time, and it was daylight, so that he could see it. There was room on the walk where there was no ice for him to pass over, if he chose to do so. He was grossly careless, or he would not have slipped down on this narrow patch of level ice. This conclusion is inevitable. He was well aware of all the danger there was in passing over this place, and took no precaution for his safety. The learned city attorney cites many cases of this court in his excellent brief, from Achtenhagen v. Watertown, 18 Wis. 331, down to Hopkins v. Rush River, 70 Wis. 10, 34 N. W. Rep. 909, and 35 N. W. Rep. 939, illustrative of such negligence. In Schaefler v. Sandusky, 33 Ohio St. 246, the court says in a similar case: "If the snow and ice presented a dangerous obstruction," etc., "it must follow, since its nature and character were known to the plaintiff, that it was imprudence in him to venture upon it, or that, if it was prudent for him to pass over it, he did not exercise due care." To the same effect is Wilson v. Charleston, 8 Allen, 137. It is said in Quincy v. Barker, 81 Ill. 300: "If it be conceded that the ice upon the sidewalk was an obstruction, it was a defect in the walk that could readily be detected. It was in the center of the walk, and in plain view, and could not escape the attention of a pedestrian unless he was walking in a hasty and reckless manner." There are many other cases cited in the brief of the learned counsel of the respondent to similar effect. This appears to be one of the plainest cases of contributory negligence to be found in the books. There was an utter want of common care and prudence on the part of the plaintiff. The judgment of the circuit court is affirmed.

NOTE.—The foregoing opinion really furnishes its own best commentary; its conclusion is based upon two material facts, both indisputably established, either of which precludes recovery—negligence on the part of plaintiff, and want of it on the part of defendant; and this conclusion will be found amply supported by authority on all sides.

The municipal duty to abate dangerous walks, etc., is ministerial, not judicial. Lehn v. Brooklyn, 19 N. Y. Sup. 668.

Cities are not liable for want of efficiency in the plan of construction, that being a legislative or judicial function, over which courts have no authority. Child v. Boston, 4 Allen, 41; Mills v. Brooklyn, 32 N. Y. 489. And yet, while there can be no liability based upon mere error of judgment, there may be liability for actual negligence, even as to the plan adopted. North Vernon v. Voelger, 103 Ind. 314.

It is entirely beyond human ingenuity to devise a plan which is not capable of danger to heedless persons. Shippy v. Au Sable (Mich.), N. W. Rep. And even local usage goes a long way towards fixing public duties, as to the care of highways in winter. McKellar v. Detroit, 5 Mich. 153. Municipal liability is founded on the negligence of municipal officers, in the discharge of their official duties, and cannot be established without proof of such negligence. Dubois v. Kingston, 102 N. Y. 219. Perhaps no better statement of the correct rule, and no more imposing array of authorities, can be found in the books, than is given in Barnes v. Dist. of Col., 91 U. S. 540, where Justice

Hunt uses this language: "The authorities establishing the doctrine that a city is responsible for its mere negligence are so numerous and so well considered, that the law must be deemed to be settled in accordance with them."

In support of this proposition, he cites the following: Robbins v. Chicago, 4 Wall. 189; Mayor v. Sheffield, 4 Wall. 658; Requa v. Rochester, 45 N. Y. 129; Springfield v. Le Claire, 49 Ill. 46; Smoot v. Mayor, 24 Ala. 112; Selma v. Perkins, 68 Ala. 145; Jones v. New Haven, 34 Conn. 1; Commissioners v. Duckett, 20 Md. 468; Pittsburg v. Grier, 22 Penn. St. 54; Cook v. Milwaukee, 24 Wis. 50; Richmond v. Long, 1 Gratt. 35; McCombs v. Akron, 15 Ohio 46; Galveston v. Barbor, 62 Tex. 12

The negligence above mentioned, as being the sole ground of municipal liability, is not necessarily gross negligence, but merely the want of reasonable care. City, etc. v. Riley, 39 Ill. App. 401.

In other words, each case is merely a question of due diligence, reasonable care, on the part of plaintiff, and the want of them on the part of the defendant. Manifestly, this is a mixed question of law and fact; the jury should ascertain the attendant and surrounding facts and circumstances; from the facts thus found, the court should draw the conclusion as to negligence. A few illustrations, taken at random, will show that, practically, each case must necessarily furnish its own rule.

The corporation is not an insurer against accidents upon its streets and sidewalks; nor is every defect therein (even though it may have occasioned the injury complained of) actionable; it is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes. Hixon v. Lowell, 13 Gray 59. The city is not liable for any mere defect, unless of such a character as to render the walk not reasonably safe for travel in the ordinary modes; and the question whether a walk was reasonably safe is for the jury. Young v. Kansas City, 44 Mo. App. 600.

When snow falls on a walk, so as to become an obstruction, it is the duty of the city to remove the same, but it must be allowed a reasonable time in which to do so. If it unnecessarily permits such obstructions as ice and snow to accumulate, to an extent that renders the walk dangerous or unsafe, and persons (not themselves negligent) fall and sustain injury by reason thereof, the city is liable, but not otherwise. Smith v. Chicago, 38 Fed. Rep. 388.

If due dilligence has been used to remove accumulations, the city is not liable. Hays v. Cambridge, 136 Mass. 402.

The municipal obligation to use reasonable care, etc., does not call for the removal of ice which merely renders the walk slippery, but which does not accumulate so as to obstruct travel, there being no ridges or inequalities to trip pedestrians. Henks v. Minneapolis, 42 Minn. 530. Where the corporation failed to clean the gutters, which consequently filled up and overflowed, covering the adjacent walks with water which suddenly froze, the city was deemed negligent. Gaylord v. New Britain (Conn.), 20 Atl. Rep. 365. So, also, where a ridge of ice and snow five or six inches high, and very uneven and slippery, was allowed to accumulate and remained undisturbed for a week. Keane v. Watertown, 130 N. Y. 188. It is only, however, when an accumulation is allowed to remain in such uneven and rounded conditions that persons using due care cannot walk over it without danger of falling, that the municipality is liable. Boberg v. Des Moines, 63 Iowa, 523.

But the law does not require impossibilities; and where snow fell for three days in succession, followed by sudden freezing, the city was not liable for an injury sustained during that time. Winne v. Albany, 15 Y. Sup. 423. And where snow and rain fell Tuesday, followed by an intense freezing which continued until Friday, at which time the injury occurred, the city was not negligent in waiting for a thaw. Slavin v. New York, 8 N. Y. Sup. 906. Again, the lapse of forty-eight hours, after the snow ceased falling, before the walks were cleaned, was not constructive notice that such walks were in a dangerous condition, and was not proof of negligence. O'Connor v. New York, 8 N. Y. Sup. 530.

GEO. C. WORTH.

BOOK REVIEWS.

RAY ON NEGLIGENCE OF IMPOSED DUTIES—CARRIERS OF PASSENGERS.

This is the third volume in what may be called a series devoted to the subject of Negligence of Imposed Duties. The first was on the special topic of personal limitations. The second treated of contractual limitations. The present volume is on the subject of carriers of passengers and as the author says in his preface "the attempt is made to state, not only the law of passenger carriers and the principles by which negligence of imposed duties involving liability is determined, but also what in fact constitutes negligence of the imposed duties of the passenger carriers, as decided by the courts with the reason on which the decision is grounded. The book impresses us as having been carefully written and conscientiously prepared.

HUMORS OF THE LAW.

Very recently an eminent counsel enlightened the Supreme Court of North Carolina with the following Scriptural quotation: "This law, your honors, is so plain that a wayfaring man, though fool, may read it a-running."

A Texas justice started to try a divorce case, when a lawyer stopped him and told him that he had no jurisdiction. "Well, I guess I can bind the fellow over," was the reply, which he proceeded to do.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION—Joinder of Parties.—Several persons may sue jointly to recover expenses jointly incurred by them in defending a malicious prosecution brought against them all.—SWALES v. GRUBBS, Ind., 33 N. E. Rep. 1124.

2. APPEAL — Recognizance. — Where a conviction is had under Pen. Code, art. 180, prohibiting the willful disturbance of a congregation assembled for religious worship, when "conducting themselves in a lawful manner," the recognizance on appeal is fatally defective which recites that the offense is "willfully disturbing a congregation assembled for the purpose of public worship."—MULLINIX v. STATE, Tex., 22 S. W. Rep. 407.

3. APPEAL—Record — Affidavits.— An affidavit of an attorney filed in the trial court, that neither he nor his client, who was a party, had notice or opportunity to be present at the trial, is not sufficient on appeal to overcome the recital in the journal entry that the parties came "by their attorneys;" especially when the verity of the entry has been sustained by the judge of the trial court, who may be presumed to have personal knowledge; and when it appears that the complaining party had two attorneys, one of whom may have been present.—EVANS v. STETTNISCH, U. S. S. C., 13 S. C. Rep. 931.

4. ARBITRATION—Validity of Submission.—An agreement to submit certain matters to arbitrators, under the statute, is of no effect if the names of the arbitrators are not in it when it is acknowledged. They cannot be inserted afterwards.—NORTHWESTERN GUARANTY LOAN CO. v. CHANNELL, Minn., 55 N. W. Rep. 121.

5. AWARD—Payment —A refusal to abide by an award by both parties thereto, made at different times, and without any meeting of the minds, does not operate as a discharge or payment thereof.—HYNES .V WRIGHT, Conn., 26 Atl. Rep. 642.

6. BANKS AND BANKING — Usury.—To entitle a party to the benefit of Act 1882, § 2, providing a forfeiture of double the amount of usurious interest, a counter claim must set up such claim in an action to recover the sum loaned, or an independent action must be brought to recover such penalty.—LOAN & EXCH. BANK v. MILLER, S. Car., 17 S. E. Rep. 592.

7. CARRIERS — Passenger — Negligence. — Where the rear platform of a car is not at a safe place for passengers to alight, failure on the part of the carrier to warn passengers of that fact is negligence, though it was safe to alight at the front platform. — MCDONALD v. ILLINOIS CENT. R. CO., Iowa, 55 N. W. Rep. 102.

8. CARRIERS—Passengers—Trespasser.—Plaintiff was injured while traveling on defendant's freight train, and claimed that he was a free passenger on such train, as part owner of a car load of stock being transported by defendant. The evidence showed that the stock was owned by one G, with whom the contract of carriage was made, and whose name alone appeared in the bill of lading, and who was alone entitled, under the contract, to free transportation. Plaintiff's only claim to the stock was a verbal agreement with G to buy part thereof after reaching their destination, if he could give proper security: Held, that plaintiff was a trespasser on defendant's train, and could recover only for injury caused by the wantonness or willfulness of defendant's servants. — RICHMOND & D. R. CO. v. BURNSED, Miss., 12 South. Rep. 958.

9. CERTIORARI—Municipal Corporations.—Where the power of a municipal body to remove from office is not discretionary, but only for cause, after notice and hearing, the proceedings are judicial in their nature, and may be reviewed on *certiorari*. On such review the court will inspect the record to see whether the body had jurisdiction, and kept within it, and whether the charges preferred were sufficient in law, and will examine the evidence, not for the purpose of weighing it, but to ascertain whether it furnished any legal and substantial basis for the removal. — STATE v. COMMON COUNCIL, Minn., 55 N. W. Rep. 118.

10. CHATTEL MORTGAGE—Partnership.—A mortgagee of personal property belonging to a partnership, having a mortgage valid only as to the interest of one of the partners, cannot maintain replevin against a receiver in charge of the partnership property under appointment from a court of competent jurisdiction.—FRANKHOUSER v. WORRALL, Kan., 32 Pac. Rep. 1097.

11. CHATTEL MORTGAGE — Sale. — A mortgagor of a chattel may make a valid sale of the mortgaged property with the mortgagee's oral consent. In such a case a sale by the mortgagor passes the title to a purchaser in good faith. — FRICK CO. v. WESTERN STAR MILLING CO., Kan., 32 Pac. Rep. 1103.

12. CHATTEL MORTGAGE TO SEVERAL MORTGAGEES—Release.—A mortgage running to several mortgagees jointly to secure a joint debt may be paid to and released by either mortgagee. — FLANIGAN v. SEELYE, Minn., 55 N. W. Rep. 115.

13. CHATTEL MORTGAGES—Attachment.—In an action brought by a mortgagee of a stock of merchandise against a sheriff who had levied on a portion thereof under an attachment, where it appears that the plaintiff has taken possession and disposed of all of the balance of the stock, except that attached by the sheriff, it is incumbent on the plaintiff to account for the property sold by him before he can recover.—MANNEN v. BAILEY, Kan., 32 Pac. Rep. 1085.

14. CHATTEL MORTGAGES—Crops Afterwards Planted. —A person conveyed land for a nominal sum, subject to several mortgages, in which the grantee was interested. By an agreement made at the time, the grantee was to sell the grantor the same land on semi-annual payments; the grantor to pay taxes, insurance, and costs of foreclosure, if necessary. Possession was to remain in the grantee until part of the debt should be paid and until then all crops, except, etc., were to belong to the grantee, who was to apply the proceeds on the debt. In case of default the agreement wasto be void, and the grantor to deliver up the premises to the grantee: Held, an attempted mortgage of crops afterwards to be planted, and therefore inoperative as to creditors.—MERCHANTS' & MECHANICS' SAV. BANK v. HOLDREDGE, Wis., 55 N. W. Rep. 108.

15. CHATTEL MORTGAGES — Lien—Good-will.—Where a newspaper, whose entire plant and good-will have been mortgaged, is consolidated with another, the name of the paper changed, and a new corporation formed to publish it, which, in the course of business, entirely uses up the mortgaged plant, the lien of the mortgage does not apply to the existing plant, substituted for that so consumed, nor to the good-will of the newspaper, even though the new corporation occupied for some years the old place of business, and paid interest for 10 months on the mortgage debt.—METROPOLITAN NAT. BANK v. ST. LOUIS DISPATCH CO., U. S. S. C., 13 S. C. Rep. 944.

16. CONTRACTS—Construction — Evidence. — Defendants ordered from plaintiffs "600 2-inch boiler-flue ferrules; 1,500 2½-inch; and 1,200 3-inch. This is outside diameter:" Held, that it was competent to show, for the purpose of explaining the meaning of the order, that, in the trade in which both parties were engaged, boiler-flue ferrules are standard articles of common use, and that it was the general custom to designate them by the size of the flues on which they were to be used; also that boiler flues are always manufactured in certain regular and standard sizes of exact outside diameters, and that, if the dimensions named in the order were to be applied to the ferrules, and not to the flues, the ferrules could not be used as

"boiler-flue ferrules."—MERCHANT v. HOWELL, Minn., 55 N. W. Rep. 131.

17. CONTRACTS—Evidence.—In an action to recover for breach of a parol contract for the sale of timber and use of defendant's saw mill, the evidence showed execution of the contract so far as defendant was concerned by giving plaintiff possession of the mill and timber. It tended to show also that defendant had afterwards obtained possession of the mill by artifice; that he refused to again surrender it to plaintiff, and otherwise interfered with plaintiff's work, plaintiff for a time submitting. There was evidence of an advance in the price of timber after the contract: Held, sufficient to take the case to the jury on the question as to breach of the contract and consequent damages. — BUCKLIN v. DAVIDSON, Penn., 26 Atl. Rep. 643.

18. CONTRACTS — Public Policy — Agreement not to Prosecute. — In an action on a note alleged to have been given in consideration of an agreement not to criminally prosecute a third person, it is error for the court, in its charge, to confine the defense to proof of an express agreement; but it should submit to the jury the question whether or not the execution of the note was made in consideration of an agreement by the payee not to prosecute, and should leave the jury to determine, from all the facts, whether or not such an agreement, either expressly entered into, or to be inferred from the circumstances had been made.—WEGNER v. BIERING, Tex., 22 S. W. Rep. 258.

19. CONVERSION—Claimant of Attached Property.—Mansf. Dig. Ark. § 327, provides that the sheriff may deliver any attached property to the person in whose possession it was found, on the execution to plaintiff of a forthcoming bond: Held, that the execution of such bond by residents of Tennessee made them parties to an action against their vendor in Arkansas, in which their property was attached, so that a failure by the obligors to assert their rights in such action estopped them from afterwards maintaining an action against plaintiffs therein for its conversion by levy and sale under special execution issued on the judgment rendered in their favor. — LOWENSTEIN v. MCCADDEN, Tenn., 22 S. W. Rep. 426.

20. CORPORATION—Appointment of Receiver.—Under Rev. St. § 1222, providing that a receiver may be appointed when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, a court of equity has jurisdiction to appoint a receiver in proceedings to secure an accounting of the officers, and the application of the funds to the proper objects of the corporation.—SUPREME SITTING OF THE ORDER OF IRON HALL v. BAKER, Ind., 33 N. E. Rep. 1128.

21. CORPORATION—Dissolution—Irrigation District.—Since St. 1887, p. 29, providing for the organization and government of irrigation districts, and for the acquisition of water and other property, makes no provision for a judicial sentence dissolving a corporation formed thereunder because of a nonuser, an action cannot be maintained to dissolve such corporation, since, in the absence of a law specially conferring it, courts are without power to dissolve a public corporation on such grounds.—PEOPLE v. SELMA IRRIGATION DIST. Cal., 32 Pac. Rep. 1047.

22. CORPORATIONS — Liability of Stockholders.—In order to charge persons as subscribers to the capital stock of a corporation, it must be shown that they subscribed to the stock of the particular corporation on account of which the liability is claimed or that they have in some manner recognized their liability as such stockholders.—HARRISON NAT. BANK OF CADIZ v. VOTAW, Kan., 32 Pac. Rep. 1111.

23. CORPORATIONS—Transfer of Stock Certificate.—An owner of stock loaned it to his son, so that the latter might become a director in the corporation. The son had a certificate issued to himself, which he afterwards delivered to his father, together with a power of attorney signed in blank. The stock was then attacked for debt as belonging to the son: Held, that the delivery was to a *bona fide* purchaser, within St. 1884, ch. 229, and that the father could therefore hold the stock as against all persons.—ANDREWS v. WORCESTER, N. & R. R. CO., Mass., 33 N. E. Rep. 1109.

24. CORPORATION—Water Companies.—An allegation that a corporation was "organized for the purpose of constructing, owning, and operating a water-works system," is a sufficient allegation that it is organized under Rev. St. § 3851, relating to the incorporation of companies to supply any city or village with water, etc., and precludes the assumption that the corporation was organized under section 4200, relating to the incorporation of companies to carry on the business of water-works sold under judgment or decree.—CLOW v. BROWN, Ind., 33 N. E. Rep. 1126.

25. COURTS—Organization of States—Jurisdiction.—When the Supreme Court of Washington was created under its constitution and the organic act, and took possession of cases pending in the territorial supreme court, it required the power to remand criminal cases to the superior courts, the successors of the former territorial district courts, for execution of its judgments.—WAY v. WOOLERY, Wash., 32 Pac. Rep. 1082.

26. CRIMINAL EVIDENCE.—On trial of an indictment for an attempt to commit an abortion, whereby the woman died, a physician of 18 years' practice, who attended deceased during her last illness, testified that a week before her death she was delivered of a five months fœtus; that he assisted in the delivery, and had previously examined her: Held, that such witness was qualified to testify as to the cause of her death.—COMMONWEALTH v. THOMPSON, Mass., 33 N. E. Rep. 1111.

27. CRIMINAL LAW—Argument of State's Attorney.—Code, § 3636, provides that if a defendant in a criminal case does not testify the State's attorney shall not refer to such fact, but, should he do so, defendant shall be entitled to a new trial: Held, that a statement that "they have the same right we have to put the defendant upon the stand, and let him tell his story, the same as we have," made in argument, in the presence of the jury, by the State's attorney, was in violation of the statute. —STATE v. BALDOSER, Iowa, 55 N. W. Rep. 97.

28. CRIMINAL LAW—Burglary.—A conviction of burglary will not be reversed for the refusal of a continuance because of an absent witness, where the evidence of the witness, if material and true, was too remote to have affected the verdict, under the facts proven.—GOLDSMITH v. STATE, Tex., 22 S. W. Rep. 405.

29. CRIMINAL LAW—Continuance.—Rev. St. § 4223, which provides that unless a person be tried within a certain time after indictment he shall be discharged, applies only in cases where the State is in fault, and not where the delay was caused by continuance granted on defendant's motion.—STATE v. MARSHALL, Mo., 22 S. W. Rep. 452.

30. CRIMINAL LAW — Disorderly House. — A house wherein the keepers permit persons to habitually assemble and engage in betting, winning and losing money and property on the prospective rise and fall in stocks, bonds, grain, and other produce, is a common gaming house, and, though there is no penal statute applicable to such particular species of gambling, the owners and controllers of such house are guilty of keeping a disorderly house.—KNEFFER v. COMMONWEALTH, Ky., 22 S. W. Rep. 446.

31. CRIMINAL LAW—Murder — Insanity. — Where the evidence shows that, if defendant was at any time previous to the homicide insane, he continued so, and had no lucid intervals, a failure to instruct the jury that the burden is on the State to show that the homicide was committed during a lucid interval is not error.—STATE v. SCHAEFER, Miss., 22 S. W. Rep. 447.

32. CRIMINAL LAW—Theft.—Where defendant, who wished to leave the neighborhood to avoid a difficulty, took his cousin's saddle on the pretense of borrowing

it to go hunting, but left with him more than sufficient property to pay for it, with a letter directing him to take such property in payment, such taking did not constitute theft.—BECKHAM v. STATE, Tex., 22 S. W. Rep. 411.

33. CRIMINAL PRACTICE.—An indictment charging that defendant, on a certain day "did, then and there being one P, a female under the age of 18 years, unlawfully and feloniously take from one P, her father, he then and there having in the legal charge" of her person, and without his consent, for the purpose of concubinage, is sufficient, under Rev. St. 1889, § 3484, providing that the taking away of any female under the age of 18, from her father, for the purpose of concubinage, is a felony.—STATE v. JOHNSON, Mo., 22 S. W. Rep. 463.

34. CRIMINAL PRACTICE — Workhouse Men.—Rev. St. 1889, ch. 18, § 744, provides that all warehouse receipts shall be negotiable by indorsement and delivery, as bills of exchange and promissory notes. Section 742 makes it unlawful for any workhouse man or other person to sell or in any manner remove any goods for which a receipt has been given by him, "without the written assent of the person holding such receipt:" Held, an indictment charging defendants with selling grain received for storage, without the assent of the person from whom they received it, is insufficient without also alleging that such person was the holder of the receipt at the time of the sale.—STATE v. KIRBY, Mo., 22 S. W. Rep. 453.

35. CRIMINAL TRIAL.—Remarks of Counsel.—A judgment in a criminal case will not be reversed on appeal because of improper remarks of counsel, unless the trial court has, on application, refused a new trial.—GRIER v. JOHNSON, Iowa, 55 N. W. Rep. 80.

36. DEED — Record. — Bona Fide Purchaser.—Hill's Ann. Laws, § 3029, provides that when a deed purports to be an absolute conveyance, but is made defeasible by a deed of defeasance, the original conveyance shall not be defeated, as against the devisee of the maker of the defeasance, without actual notice thereof, unless such instrument shall have been recorded: Held, that the continued possession by the grantor of land was not notice of an unrecorded defeasance held by him.—EXON v. DANCKE, Oreg., 32 Pac. Rep. 1045.

37. DEED — Community Property.—A deed by a widow, of community property in satisfaction of a community obligation, made 15 years after her husband's death, and after she had taken out letters of administration, and the estate had been partitioned in whole or in part, and the administration had been closed, does not convey the interest belonging to her deceased husband in his lifetime, since it will be presumed that her power over the community as survivor for such purpose had then ceased.—WILLIAMS v. HARDIE, Tex., 22 S. W. Rep. 399.

38. DESCENT OF DISTRIBUTION — Standing Timber.—Standing timber on the land of a deceased being real estate, the money received from its sale after it is cut down remains real estate, for the purposes of descent and distribution.—IN RE MULHOLLAND'S ESTATE, Penn., 26 Atl. Rep. 612.

39. EJECTMENT — Tenancy in Common. — Where the owner on an undivided one-fourth interest in a tract of land, acting solely for himself, sues to recover the whole tract from a person in possession under an adverse title, and where it appears that the plaintiff and the holder of the other three-fourths have no community of interest, and do not recognize each others' titles: Held, that the plaintiff can only recover possession of his own share in an action of ejectment.—KING v. HYATI, Kan., 32 Pac. Rep. 1105.

40. ELECTION OF CONTEST— County Commissioner—"Eligible."—Gen St. 1889, par. 1622, provides that "no person holding any State, county, township or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall be eligible to the office of county commissioner:" Held, that the word "eligible," as used in the statute, means "legally qualified;" that is, capable of holding office. The term "eligible," as used, does not mean "eligible to be elected" to the office of county commissioner at the date of the election, but "eligible or legally qualified" to hold the office after the election; that is, at the commencement of the term of office —DEMAREE v. SCATES, Kan., 32 Pac. Rep. 1123.

41. ESTOPPEL — Acceptance of Legacy—Where a residuary clause in a will merely leaves all of testator's remaining property, real and personal, without specifying any particular land or interest, it only gives such interest as testator may be found to have; and a specific legatee, by accepting his legacy, is not estopped from claiming that a deed from him to the testator, absolute on its face, of land which was in the possession of testator at his death, and which is claimed by the residuary devisees under such a residuary clause, was intended as a mortgage, and that the mortgage debt is satisfied. In such case parol evidence is not admissible to show that testator intended, by the residuary clause, to devise the land as belonging to him absolutely.—TOMPKINS v. MERRIMAN, Penn , 26 Atl. Rep. 659.

42. EVIDENCE — Handwriting — Expert Witness.—Where the genuineness of the signature of a deceased subscribing witness to a receipt signed by mark only is testified to by two disinterested persons, familiar with the handwriting, and the only evidence impeaching such signature is that of an expert, whose opinion is based largely on comparisons made with admitted genuine signatures, and who admits that the receipt may be genuine, a finding that the receipt is genuine is proper.—IN RE ROCKEY'S ESTATE, Penn., 26 Atl. Rep. 656.

43. EXTRADITION — Proceedings — Requisition.—The initiative of proceedings for the extradition of an alleged criminal does not necessarily rest on a demand or requisition by the foreign government upon our government; but such proceedings may be commenced by the arrest of the person charged, under a warrant issued by a United States commissioner on complaint of a foreign consul.—IN RE ADUTT, U. S. C. C. (Ill.), 55 Fed. Rep. 376.

44. FEDERAL OFFENSE — Post Office — Obstructing Mails.—Boys who place obstructions on the track of an electric railway whereon the United States mails are carried, and by so doing delay the mail, or force it to be carried in some other way, are guilty of the crime of obstructing the mails, under Rev. St. § 3995.—UNITED STATES v. THOMAS, U. S. D. C. (W. Va.), 55 Fed. Rep. 380.

45. FRAUDULENT CONVEYANCES.—An instruction that one purchasing goods partly for cash and partly in satisfaction of a pre existing debt will be protected as a *bona fide* purchaser only to the extent of the cash payment, and not even to that extent if he has received at the same time other goods, more than sufficient to reimburse him for the cash payment, is sufficiently favorable to the purchaser even if it contains error.—GAVIN v. ARMSTEAD, Ark., 22 S. W. Rep. 431.

46. FRAUDULENT CONVEYANCES — Knowledge of Grantee.—Where a mortgagor attempts to convey all his property, and the corn and cotton he expects to raise in the two years following, to secure an amount largely in excess of what he owes, when he is embarrassed by debt, and the mortgagee has knowledge of his financial condition, it will be presumed that the mortgage is in fraud of creditors, and the burden is on the mortgagee to overcome such presumption.—HENRY v. HARRELL, Ark., 22 S. W. Rep. 433.

47. GARNISHMENT — Carriers.—A railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Such a garnishment at the suit of a stranger to the contract of carriage, while it remains in force,

excuses the company from delivering the property to the shipper or consignee.—COOLEY V. MINNESOTA TRANSFER RY. CO., Minn., 55 N. W. Rep. 141.

48. HOMESTEAD—Lease—Exemption.—Where a judgment debtor, who is the head of a family, and temporarily absent from her homestead for a year for the purpose of educating her daughter, executes a lease of the homestead during such absence, the money due her for rent under the lease is exempt from execution issued on a judgment against her.—MORGAN V. ROUNDTREE, Iowa, 55 N. W. Rep. 65.

49. HUSBAND AND WIFE—Antenuptial Agreement.—Where there is an oral agreement between husband and wife to allow property acquired by either to remain the property of the one so acquiring it, a conveyance for value, by the husband alone, of an equitable interest acquired by him, is good as against a subsequent transfer of such interest by both husband and wife to one taking with notice of such agreement.—CALHOUN V. LEARY, Wash., 32 Pac. Rep. 1070.

50. HUSBAND AND WIFE—Separate Use Trust.—A devise of land to a woman "to have and to hold to her sole and separate use, free from the interference or control of her husband, and to her heirs and assigns forever," in the absence of anything to show a different intent, creates a separate use trust, giving the devisee the equitable title and not the fee, and she cannot incumber the land.—HAYS V. LEONARD, Penn., 26 Atl. Rep. 664.

51. INJUNCTION AGAINST SHERIFF'S SALE.—A bill for an injunction by mere contract creditors will not lie to restrain execution sales of the debtor's property on the ground of fraud and collusion between the latter, the execution plaintiffs, the sheriff, and the assignee for benefit of creditors of such debtor. Nor, as a general rule, will such bill lie in favor of attaching creditors, but they will be left to pursue their remedies at law.—E. R. ARTMAN-TREICHLER CO. V. GILES, Penn., 26 Atl. Rep. 668.

52. INJUNCTION — Transfer of Securities.—Complainant alleged that he had deposited his note and stock, as collaterals, representing a controlling interest in a corporation, in the hands of a third person, to be delivered to defendant upon its performance of certain things, and that defendant had wrongfully got possession of the note and stock before such performance, and was about to dispose thereof: Held, that a prayer for an injunction was properly granted, there being no adequate remedy at law in case of a sale of the stock to an innocent purchaser, nor could the loss of the controlling interest be properly measured in damages.—HOWER V. WEISS MALTING & ELEVATOR CO., U. S. C. C. OF APP., 55 Fed. Rep. 356.

53. INSOLVENCY—Dissolution of Attachments.—Gen. St. § 523, provides that the commencement of proceedings in insolvency shall dissolve all attachments made within 60 days next preceding: Held, that an attachment made on September 4th, between 7 and 8 o'clock in the morning, was dissolved by an assignment in insolvency made by the debtor on November 3 following, at 10:30 o'clock in the forenoon.—MINER V. GOODYEAR INDIA-RUBBER GLOVE MANUF'G CO., Conn., 26 Atl. Rep. 643.

54. JUDGMENT IN REPLEVIN—Enjoining Enforcement.—Where judgment is rendered for defendant in replevin for a return of the property or the value thereof, the facts that the property belonged to a firm of which plaintiff was a partner, and that plaintiff cannot return the property because he has appropriated it to the use of the firm, furnish no ground for enjoining the enforcement of the judgment.—BOWMAN V. MCGREGOR, Wash., 32 Pac. Rep. 1059.

55. LANDLORD AND TENANT—Attachment — Bond.—A landlord brought attachment for rent against J and E J was personally liable as lessee, and E's goods, which had been purchased from J, were seized. To release his goods, E executed a bond conditioned to deliver the property or its value "to satisfy any judgment that may be rendered against said defendant in said suit." On the trial E's goods were found to be liable for the rent, but personal judgment was entered against J alone, directing that a "special execution issue therefor:" Held, that the bond was valid as a common-law bond, and E was liable thereon for the amount of the judgment, as, so far as it directed special execution to issue, it is a judgment against E within the meaning of the bond —PAINTER V. GIBSON, Iowa, 55 N. W. Rep. 84.

56. LANDLORD AND TENANT—Distress.—The goods of a third person consigned to an agent to be sold on commission are not liable to distress for rent due by the agent, and the landlord, if he knows that the goods are so owned, and has them sold under distress, is liable to the owner in trespass.—BROWN V. STACKHOUSE, Penn., 26 Atl. Rep. 669.

57. LIMITATIONS.—Where, before the accruing of a cause of action, a party procures the allowance of an injunction restraining the commencement of an action upon such cause, and its continuance in force until the period allowed by the statute of limitations for commencing such action has expired, such party will not, after such injunction has been dissolved because wrongfully obtained, be permitted, in a court of equity, to plead the statute of limitations as a bar to such action.—TREASURER OF BROWN COUNTY V. MARTIN, Ohio, 33 N. E. Rep. 1112.

58. LIMITATIONS—Revival by Written Promise.—McClain's St. § 3744, provides that "causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same," when made in writing, and signed by the party charged: Held, that a cause of action for a tort barred by the statute is not revived by a promise, in writing, to pay the damages claimed therefor.—PETERSON V. BREITAG, Iowa, 55 N. W. Rep. 86.

59. LIMITATION OF ACTIONS — Void Tax Sales.—As against a claim upon a county to have returned the amount of money paid out for lands at a void tax sale, as provided in Gen. St. 1878, ch. 11, § 97, as amended by Gen. Laws 1881, ch. 10, the statute of limitations commences to run on the day of the entry of judgment against the purchaser adjudging and decreeing such sale void.—EASTON V. SORENSON, Minn. , 55 N. W. Rep. 128.

60. MASTER AND SERVANT—Negligence.—Where young persons without experience are employed to work at dangerous machines, the employer must give suitable instructions as to the manner of using them, and warning as to the danger of carelessness, and if he neglects such duty, or give improper instructions, he is liable if by reason thereof injury results to the employee.—TAGG V. MCGEORGE, Penn., 26 Atl. Rep. 671.

61. MECHANIC'S LIEN.—Subcontractors, who furnish materials specially designed and made for a building, and necessary for its completion, are entitled to a lien therefor, though such material has not been used, in consequence of the suspension of work by the contractor.—MECHANICS' MILL & LUMBER CO. V. DENNY HOTEL CO., Wash., 32 Pac. Rep. 1073.

62. MECHANIC'S LIEN—Subcontractors.—The fact that the secretary of a railroad company, while acting as clerk of the contractors in the construction of the road, issued to the subcontractors statements of their account with contractors, on the company's blanks, purporting to bind the company to pay the same, does not render the company liable to the subcontractors, so as to give the latter a mechanic's lien on the company's property, as contractors.—BLANDING V. DAVENPORT, I. & D. R. CO., Iowa, 55 N. W. Rep. 81.

63. MECHANICS' LIENS.—Under Act April 5, 1889, providing that any one furnishing labor or material for a building shall, on compliance with the provisions of the act, have a lien thereon; requiring an original contractor, or any other person, to file with the county clerk his contract, within a certain time, with the proviso that, if such other person has no written contract, it shall be sufficient to file an itemized account

supported by affidavit; and declaring that if there be no written contract the person seeking the benefits of the act shall file with the clerk of the county court a sworn account—a lien can be enforced by an original contractor though his contract is not in writing.—STATE v. CHEROKEE IRON MANUF'G CO., Tex., 22 S. W. Rep. 253.

64 MECHANICS' LIENS.—Where materials are furnished to a contractor for use in a certain house, there need not be an understanding that the material-men intend to claim a lien, nor is it important that they charge the contractor with the debt, since they are entitled to both securities, and need not elect between the two, so long as any part of the debt remains unpaid.—BASSETT v. BERTORELLI, Tenn., 22 S. W. Rep. 423.

65. MORTGAGE — Cancellation.—Certain joint owners sold their land, and took back a mortgage for the price. As the owners were then insolvent, the land was subjected to the payments of their joint debts, and it was agreed by the parties thereto that the mortgage debt should be canceled, and the contract of sale rescinded. The purchaser subsequently bought the land under the decree of sale: Held, that there was no foundation for an action by the administrator of one of the joint owners on the original mortgage.—ROBB v. DOUGLASS, Iowa, 55 N. W. Rep. 72.

66. MORTGAGE — Community Property.—A mortgage on community property, executed by a man living separate from his wife, and holding himself out as unmarried is valid unless the mortgagee knew that the mortgagor was a married man, or had such knowledge would lead a man of ordinary prudence to further investigation.—SCHWABACHER BROS. & CO. v. VAN REYPEN, Wash., 32 Pac. Rep. 1061.

67. MORTGAGE — Foreclosure—Limitation.—Where a promissory note secured by a mortgage is barred by the statute of limitations, an action to foreclose the mortgage cannot be maintained.—CULP v. CULP, Kan., 32 Pac. Rep. 1118.

68. MORTGAGE — Foreclosure—Redemption.—A subsequent lienholder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities. But, if thereby prevented from redeeming, his damages would not exceed the amount of his debt.—PARKER v. ST. MARTIN, Minn., 55 N. W. Rep. 113.

69. MORTGAGES — Funds Converted by Trustee.—By agreement between L and M, certain money in their hands, as trustees, was loaned to the former, for which he executed his note to M, as trustee, and agreed to give security. Soon thereafter, M died, and L, who was insolvent, on demand of some of the beneficiaries of the trust, executed a trust deed to plaintiff to secure the note, which had previously been delivered to the latter: Held, that such deed was not given by L to secure a debt due to himself, but to secure a debt due from him to the beneficiaries of the fund which he had converted, and was valid against his personal junior judgment creditors.—WOLFE v. JAFFRAY, Iowa, 55 N. W. Rep. 91.

70. MUNICIPAL CORPORATION—Expenditures by Committee.—Where city councils adopt and ratify the acts of a committee thereof in making necessary expenditures, which, however, the committee had not authority to make, the city will be bound thereby.—SILSBY MANUF'G CO. v. CITY OF ALLENTOWN, Penn., 26 Atl. Rep. 648.

71. MUNICIPAL CORPORATIONS — Statutes.—Code 1892, ch. 93, is a general act for the government of all municipal corporations in the State, but provides that existing municipalities may elect not to come under its provisions, by resolution of the corporate authorities, "entered of record, and certified to the secretary of State, within 12 months" after the chapter becomes operative: Held, that such a resolution, adopted within the specified time, but not certified to the secretary of State until after the expiration thereof, is a nullity.—STATE v. GOVAN, Miss., 12 South. Rep. 959.

72. MUNICIPAL CORPORATIONS—Street Improvements.—Under a charter conferring on a a city power to pave its streets, and to require owners of adjacent lots to pave one half in width of the street contiguous to their respective lots, the owners of lots on each side of the street are required to pay for one-half of the paving, whether the paving covers a part only for the full width of the street, and whether the paving is in the center of the street or on one side only; and, where the paving is on one side only, the adjacent owner on that side is only liable for one-half the expense.—CITY OF MUSCATINE v. CHICAGO, R. I. & P. RY. CO., Iowa, 55 N. W. Rep. 100.

73. MUTUAL BENEFIT SOCIETY — Change of Beneficiary.—Where a certificate issued by a benevolent association to a member for benefit of the member's heirs is afterwards changed, as permitted by the association, so as to be payable to a stranger, he alone is entitled to payment.—MULDERICK v. GRAND LODGE, Penn., 26 Atl. Rep. 663.

74. NEGOTIABLE INSTRUMENT—Denial of Signature.—Under Code, § 2730, providing that the signature to a written instrument on which suit is brought shall be deemed genuine and admitted unless the person whose signature it purports to be shall deny its genuineness under oath, a denial of the execution of a note, in an action against the executor of the person alleged to have executed it, includes a denial of the genuineness of the signature.—SMITH v. KING, Iowa, 55 N. W. Rep. 88.

75. NEGOTIABLE INSTRUMENT—Indorsement—Venue.—Code, § 2586, provides that, with certain exceptions, personal actions must be brought in a county wherein some of the defendants actually reside. Section 2581 provides that, when a written contract is to be performed in any particular place, action for a breach thereof may be brought in the county wherein such place is situated: Held, that the blank indorsement of a note payable at a particular place does not require the indorser to pay at that place, and unless therefore, he is a resident of the county, no action can be brought against him therein.—DAVIS v. MILLER, Iowa, 55 N. W. Rep. 89.

76. NEGOTIABLE INSTRUMENT — Parol Agreement for Rebate.—A parol agreement made by a mutual life insurance company with a policy holder at the time that the latter executes his premium note, payable four months after date, that the maker should have a rebate of 30 per cent. of the face of the note, is not contradictory of the written obligation, and, in an action by such company against the maker, an affidavit of defense setting up such parol agreement is sufficient.—MICHIGAN MUT. LIFE INS. CO. v. WILLIAMS, Penn., 26 Atl. Rep. 655.

77. NEGOTIABLE INSTRUMENT—Release of Surety.—An agreement to extend the time of payment of a note, in consideration that the maker will pay the payee a certain other matured debt owing by the former to the latter and pay the interest on the note, is *nudum pactum*, and the surety on the note is not thereby released.—BEASLEY v. BOOTHE, Tex., 22 S. W. Rep. 255.

78. NEGOTIABLE INSTRUMENTS—Waiver of Protest.—Where indorsers of a negotiable promissory note tell the holder before maturity not to do anything with the note, and that they will pay it, it is unnecessary, in order to charge them as such indorsers, that formal demand of payment be made on the maker, and notice given to the indorsers of his failure to pay, but demand and notice will be deemed waived.—MARKLAND v. MCDANIEL, Kan., 32 Pac. Rep. 1114.

79. NOVATION.—Knowledge by a creditor of the dissolution of a firm, and of the assumption of the firm indebtedness by the continuing partner, together with a delay of two years before making a demand on the retiring partner for the debt, does not establish such a consent or acquiescence by the creditor in the arrange-

ment between the partners as will constitute a novation.—WADHAMS v. PAGE, Wash., 32 Pac. Rep. 1068.

80. NUISANCE—Escaping Oil. — The escape of oil of a pipe-line company not clothed with the right of eminent domain, and its percolation through plaintiff's land, and destruction of his springs, constitute a nuisance, and the company is liable for consequential damages, regardless of negligence in permitting the oil to escape.—HAUCK v. TIDE WATER PIPE-LINE CO., Penn., 26 Atl. Rep. 644.

81. PAYMENT — Appropriation. — A running account, although composed of items partly secured and partly not, is so far one debt that the creditor has no election, in the absence of any appropriation by the debtor, as to which item he will credit; the payment going by force of law to the oldest items.—DUNNINGTON v. KIRK, Ark., 22 S. W. Rep. 430.

82. PRINCIPAL AND AGENT—Notice.—Where the owner of property authorizes an agent to exchange it for other property, and "to sell and contract with the purchaser for said premises according to the price and terms of payment above written, or any price or terms which" may be agreed on, such agent is a general agent, and notice to him of an infirmity in the title of the property taken in exchange is notice to the principal.—HICKMAN v. GREEN, Mo., 22 S. W. Rep. 455.

83. PROCESS—Service.—A person who has attained the age of 14 is at years of legal discretion, and *prima facie* is a person of "suitable age and discretion," within the meaning of Gen. St. 1878, ch. 66, § 59, subd. 4, regulating the manner of the service of a summons in a civil action.—TEMPLE v. NORRIS, Minn., 55 N. W. Rep. 133.

84. PROCESS—Service of Summons.—A justice's docket showed that summons had been served "by leaving copy at place of business." The return merely was, "Served by copy:" Held, not to show that service had not been made on defendant personally, or by leaving copy at his dwelling, as required by act of assembly; and a judgment rendered in such case is not void, but voidable.—SWEENEY v. GIROLO, Penn., 26 Atl. Rep. 600.

85. PUBLIC POLICY—Dealings of State Officer with Himself.—It is against public policy for the secretary of internal affairs, who has charge of the survey and sale of the public lands of the State, and custody of the books and documents relating to them, and who by virtue of his office is a member of the board of property, and sits therein as a judge of questions affecting returns of survey, location of warrants, etc., to deal with his own department by receiving and granting his own application for a land warrant, causing a survey, accepting the return, passing on the validity of the survey, and finally causing a patent to issue to himself; and the same is true of his deputy; and a warrant so issued to the deputy secretary of internal affairs confers no title as against a claimant under an older survey.—GOODYEAR v. BROWN, Penn., 26 Atl. Rep. 665.

86. RAILROAD COMPANY — Persons on Tracks.—An engineer is not willfully negligent in failing to stop, while there is yet time, to examine an object which he supposes to be a dog, or something inanimate, lying on the track, but which, on closer approaches, is discerned to be a child, but is only so negligent in case he might have stopped after the child had been discerned as such.—LOUISVILLE, N. O. & T. RY. CO. v. WILLIAMS, Miss., 12 South. Rep. 957.

87. RAILROAD COMPANIES—Right of Way. — Though Laws 1849, p. 219, incorporating a railroad, and Laws 1851, p. 272, amendatory thereof, authorize the road to take the fee-simple or other title to land, provide for its taking voluntary relinquishments of the right of way, and, in case of a refusal to relinquish the right of way, give the right to condemn it, in which proceedings an order shall be made vesting in the company "the fee-simple title of the land," still, the evident scope of the acts being simply to have the land either relinquished or taken for the purpose of a railroad, the company will take, even under a deed purporting to convey the fee, only the easement of a right of way.—CHOUTEAU v. MISSOURI PAC. RY. CO., Mo., 22 S. W. Rep. 458.

88. RAILROAD COMPANIES — Street. — The fact that a city authorizes the construction of a railroad on its streets in accordance with its charter, the injury to the property abutting on such streets to be first ascertained, and compensated for in the manner provided for compensating injuries arising from regrade of streets, does not relieve the railroad company from liability for such injury, and impose it on such city.—HATCH v. TACOMA, O. & G. H. R. CO., Wash., 32 Pac. Rep. 1063.

89. SPECIFIC PERFORMANCE — Indefinite Contract.—Where a written contract to convey 10 acres of land, conditioned upon the construction of a cable road by the vendee, fails to specify any particular land, specific performance will not be decreed, in the absence of evidence that the vendee, before the death of the vendor, took possession of the land intended to be conveyed.—ROCHESTER v. YESLER'S ESTATE, Wash., 32 Pac. Rep. 1057.

90. TAXATION—National Banks.—Under Rev. St. U. S. § 5219, which authorizes the taxation of national bank shares to the owner or holder, but which empowers the legislature of each estate to determine the manner and place of taxing such shares, the State has a right to resort to the bank as a garnishee for the collection of its claims against the stockholders for taxes, and the legislature may require the assessment of the stock to be made to the bank *in solido*.—FIRST NAT. BANK v. CHEHALIS COUNTY, Wash., 32 Pac. Rep. 1051.

91. TRUST.—Accounting between trustee and *cestui que trust*, not under disability, annual receipts by the latter containing accounts which credit the trustee with amounts paid for taxes upon the trust fund amount to admissions that the sums thus credited were justly paid by the trustee, which, in absence of proof of fraud or mistake, are conclusive against the *cestui que trust*.—WELSH v. BROWN, N. J., 26 Atl. Rep. 568.

92. TRUST.—The cost of improvements made on land by the guardian of an infant life tenant during the infancy of the remainder-men, for the purpose of making it more productive, cannot be made a charge on the estate in remainder, even though such improvements were made by authority of the chancery court, given in a proper proceeding instituted by the guardian.—CALDWELL v. JACOB, Ky., 22 S. W. Rep. 436.

93. TRUST—Power to Revoke.—Where an aged man, addicted to drink, and with an hereditary tendency to insanity, in fear of impending insanity, created a trust in all his property, whereby he was to receive the entire income and the trustee only a small commission, and reserved to himself only the right of testamentary disposition, the trust thus created must be deemed irrevocable in the absence of any showing of fraud practiced on him to persuade him to execute the instrument.—REIDY v. SMALL, Penn., 26 Atl. Rep. 602.

94. VENDOR AND PURCHASER—Assumption of Mortgage.—A grantee of real estate, who has assumed the payment of a mortgage thereon, is not discharged from liability to the mortgagee merely because the mortgagee has foreclosed his mortgage as against the mortgagor and a subsequent grantee of the mortgaged property, and had sold the mortgaged property thereunder, and other property of the mortgagor, attached in the foreclosure suit, but such mortgagee may still pursue his remedy against the grantee, who has assumed the payment of the mortgaged debt.—ROUSE v. BARTHOLOMEW, Kan., 32 Pac. Rep. 1088.

95. VENDOR AND PURCHASER—Assumption of Mortgage.—To create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the covenant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by

the grantee. Where a grantee of land takes the same subject to a certain mortgage, he does not thereby assume any personal liability, but simply takes the land charged with the payment of the mortgage debt. —HOLCOMB v. THOMPSON, Kan., 32 Pac. Rep. 1091.

96. VENDOR AND PURCHASER — Contract.—A written bond or contract for a deed of land, putting the purchaser thereof in immediate possession, and containing no provision for the forfeiture of the bond or contract if the purchaser fails to pay the installments of purchase money due thereon, passes the entire equitable estate to the purchaser. The legal title is merely held by the vendor as security for the payment of the balance of the purchase money.—JONES v. HOLLISTER, Kan., 32 Pac. Rep. 1118.

97. VENDOR AND PURCHASER—Damages.—In an action by a vendee for a breach of contract to sell real property because of the inability of the vendor to convey good title, the former is entitled to recover of the vendor interest upon all moneys paid on the contract from the date of payment, whether the same was paid as principal or as interest; and is also entitled to recover such sums as he may have paid as taxes upon the premises, with interest from the dates of payment. —LANCOURE v. DUPRE, Minn., 55 N. W. Rep. 129.

98. VENDOR AND PURCHASER—Rescission—Tendor.—A vendor who seeks to obtain a reconveyance of land on the ground of misrepresentation or mistake must tender the full consideration received by him, and the fact that he paid a commission to his agent for negotiating the sale does not entitle him to deduct the amount of such commission from the sum tendered.—WOOD v. NICHOLS, Wash., 32 Pac. Rep. 1055.

99. WATER-COURSE—What Constitutes.—In an action to enjoin the diversion of the water of a stream, it appeared that it came from springs, one of which was on defendant's land; that for many years it flowed across the road running between defendant's and plaintiff's land, and over the latter into a river; and that, if there was ever any change in its course, it was so gradual that the fact could not be easily shown: Held, that the course of the water was over plaintiff's premises, though it may have been changed by deposits from adjacent hills.—HINKLE v. AVERY, Iowa, 55 N. W. Rep. 77.

100. WATERS—Diverting Surface Water. — An owner may improve his land for the purpose for which such land is ordinarily used, and may do what is necessary for that purpose. He may build upon it, or raise, or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go. — BROWN v. WINONA & S. W. RY. CO., Minn., 55 N. W. Rep. 123.

101. WILL—Devisees—Per Stirpes.—Testatrix left surviving her two children and eight grandchildren, the issue of a deceased son, her will providing that her estate should be divided "in equal shares to her legal heirs:" Held, that the devisees took *per stirpes*, and not *per capita*, under Act April 8, 1833, which provides that the issue of the deceased child of an intestate shall take by representation of their parent such share only as would have descended to such parent at intestate's death.—IN RE HOCH'S ESTATE, Penn., 26 Atl. Rep. 610.

102. WILL—Substitution of Legatees.—Where a testator bequeaths his estate to several legatees, but, learning of their death, interlines in the will between the words "as follows" and the list of the legatees the words "or to their heirs," and after the names adds words signifying their decease, and republishes the will, the legacies will not lapse, since the additions indicate words of substitution, and that "or" is clearly intended to be used for that purpose.—IN RE GILMOR'S ESTATE, Penn., 26 Atl. Rep. 614.

103. WILL—Absolute Gift.—The bequest of the interest or produce of a fund, directly or through a trustee, to a legatee, without limitation as to continuance, is a gift of the fund itself.—HARTSON v. ELDEN, N. J., 26 Atl. Rep. 561.

104. WILLS — Bequest to Charity.—A bequest to the "pastor of St. John's R. C. Church," in the absence of evidence of any trust, is a bequest to the pastor personally, and not void, under act April 26, 1855, as a religious or charitable bequest.—IN RE HODNETT'S ESTATE, Penn., 26 Atl. Rep. 623.

105. WILLS — Contest — Capacity.—A person of very moderate capacity, under favorable circumstances, may make a valid will; it appearing that he can comprehend his property, the natural objects of his bounty, and the disposition he has determined to make of his property.—HOWELL v. TAYLOR, N. J., 26 Atl. Rep. 566.

106. WILLS—Material Alteration—Probate.—Where a will, after it has been executed and published, is materially altered by erasures, and the person who made the erasures testifies that she made them at request of testatrix, but is the only witness to such fact, the will, in its altered form, will not be admitted to probate.—IN RE SIMRELL'S ESTATE, Penn., 26 Atl. Rep. 599.

107. WILLS—Rights of Legatees.—Under a will providing that, after the death of testator's wife his property be equally divided between the heirs of his brothers and sisters, share and share alike, as though such brothers and sisters were living, the heirs of testator's brothers and sisters take *per capita*, and not *per stirpes*.—MCFATRIDGE v. HOLTZCLAW, Ky., 22 S. W. Rep. 439.

108. WILLS — Undue Influence.—Every person competent to make a will has a right to the aid of any person he may think proper to select, when he desires to put his testamentary wishes in form to have legal efficacy; and if he exercises this right without improper interference or control, though he selects the person he intends to make his principal beneficiary, that fact, in the absence of evidence showing an abuse of confidence, constitutes no reason why probate should be denied to his will.—BENNETT v. BENNETT, N. J., 26 Atl. Rep. 573.

109. WITNESS—Transactions with Decedents.—When both parties to a suit stand upon the record in a representative capacity, either of such parties may call his adversary, or offer himself as a full witness on all points in the cause.—HAINES v. WATTS, N. J., 26 Atl. Rep. 572.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

ADMINISTRATION — Validity of Agreement—For Division of Commissions.—A contract wherein an administrator agrees, for a valuable consideration, to divide his future commissions with another person, which contract was made subsequent to his appointment and having no connection therewith, is not illegal. Affirmed.—GREER v. NUTT.

CONTRACTS—Of Insane Person—Void.—In an action to recover the balance due on a promissory note executed by the defendant it appeared that prior to the execution of the note there had been an inquiry as to defendant's sanity and an adjudication of lunacy. In the absence of a decree of restoration: Held, that the adjudication of lunacy is conclusive and renders subsequent contracts by the lunatic invalid, whether he has a guardian or not, and its effect on the contracts of the insane person cannot be overcome by proof that he has become capable of managing his own affairs. Affirmed.—KIEHNE, EXEC., v. WESSELL.

CORPORATIONS, MUNICIPAL—Questioning Corporate Existence.—In an action to uphold a conviction of the

defendant for the violation of an ordinance of a city of the fourth class: Held, that the validity of the corporate existence of the plaintiff cannot be questioned by defendant in a proceeding for the violation of one of its ordinances, but only by proceedings of ouster on behalf of the State. Reversed.—CITY OF BILLINGS V. DUNNAWAY.

EVIDENCE—Measure of Damages for Neglect—Injury and Destruction by Fire of Fruit Trees.—Recovery is sought for the destruction by fire, of fruit trees and hedge, negligently or willfully communicated by act of defendant's servants in burning out its right of way: Held, that where the essential value of the trees or shrubs arise from their connection with the soil, the difference in value of the land before and after their removal is the measure of recovery of the owner, and testimony as to the measure of damages should be so restricted. Reversed.—SHANNON V. RY.

FORECLOSURE OF MORTGAGE—Practice upon Failure to File Notes Secured.—In an action of foreclosure under the statute, plaintiff's petition was founded upon a debt evidenced upon the mortgage alone. The mortgage secured two promissory notes: Held, that it is proper for defendant to plead that mortgage was given to secure certain promissory notes and then move to dismiss, because they were not filed with the petition, nor their absence satisfactorily accounted for. Reversed.—PHARIS, ADMR., V. SURRETT.

INSTRUCTIONS—Submission to Jury of—Several Causes of Action.—In a suit where several causes of action are set forth in the petition and are before the jury: Held, that plaintiff's instructions were properly refused because they did not indicate specifically to which counts they were severally addressed, but concluded with the statement that the finding of certain facts by the jury entitled plaintiff to recover. Reversed.—BAILEY V. A. SEIGEL GAS FIXTURE CO.

JUDGMENTS—Justice of the Peace—What Must Appear to Confer Jurisdiction in Landlord Summons.—In a suit by the assignee of a judgment, recovered in a case of landlord summons, the validity of the judgment is attacked. The transcript of the justice showed that judgment was rendered by default upon five days' service, but failed to show anterior filing of a verified statement: Held, that as justice has no power to render a money judgment by default upon five days' service, unless it be in a proceeding upon a landlord summons, and as his jurisdiction to issue such a summons depended upon the anterior filing of a verified statement; the filing of such statement should appear by the papers in the cause which constitute the judgment role in the particular case. Reversed.—WISE V. LORING.

KILLING STOCK — Rev. St. 1886, Sec. 2611—Judgment Reversed as against Evidence.—In an action under the statute for the killing of a steer by defendant's cars, where the uncontradicted evidence tends to show that steer entered upon defendant's track where it was not by law required to fence the same, there can be no recovery for double damages and judgment must be reversed. Reversed.—GRENSHAN V. RY.

LIMITATIONS — Commencement of Action — Rev. St. 1889, Sec. 2013.—Under the statute an action is not commenced in a court of record until the petition has been filed and process has been sued out therein: Held, accordingly, that it is not sufficient that petition has been filed in due time, but it is also necessary that process should actually have issued within the period limited for the commencement of the suit. Reversed.—WATKINS V. RY.

MECHANIC'S LIEN— Use of Material Sued for.— In a suit to enforce a mechanic's lien against a house, where the evidence failed to show that the materials furnished went into the building and were used in its construction: Held, that material-man was not entitled to a lien. Reversed.—CURRENT RIVER LUMBER CO. V. CRAVENS.

PRACTICE, APPELLATE—Art. 6, Sec. 20, Constitution.—The appellate court may hear all cases coming before them on appeal, upon the expiration of fifteen days from the filing of the transcript in the office of the clerk of the court: Held, therefore, that court has power to order cause to be docketed at term during which the appeal was taken. Motion to vacate order overruled.—STATE EX REL. V. DAVIS.

PRACTICE—Re-opening Case after Submission.—The trial court may within its sound discretion allow a party to reopen his case, provided such ruling does not work to the detriment of the adverse party, as to presentment of his proof. Affirmed.—RELAND V. EXECUTORS OF BASHEARS.

PRACTICE—Vacating Judgment—Power of Trial Court.—Judgment was rendered against plaintiff upon his failure to appear when the case was called for trial. At a subsequent day of the same term the plaintiff appeared and moved the court to set aside the judgment. The sustaining of the motion is assigned for error: Held, that the trial court, for good cause, has the power to vacate its judgment during the term when the same was rendered. Affirmed.—MARTIN V. ST. CHARLES TOBACCO CO.

STATUTE OF FRAUDS—How Defense must be Made to be Available.—The statute of frauds, in order to be available as a defense, must be specially pleaded or timely objection to the evidence made at the trial. It cannot be raised for the first time by the instructions. Affirmed.—HOBART V. MURRAY.

TRESPASS—Rev. St. 1889, Secs. 8675-78.—In an action under the statute, for the removal of timber from the land of another, it appeared, that the defendant bought the cut timber from the lessee of the plaintiff and that the defendant was aware of the terms of the lease which entitled lessee, to dispose of timber cut by him, while clearing the land of trees and preparing it for the plow, but not otherwise: Held, that defendant had the right to assume that the timber was cut by the lessee when he had the right to do so, and, therefore, he is not liable to the lessor, unless it be affirmatively shown that he knew the cutting was wrongful. Affirmed.—CRAMER V. GROSECLOSE.

TRESPASS—Rev. St. 1889, Sec. 7807-27—Power of Road Overseer of Public Roads.—In an action for a trespass by defendants for removing fencing, thereby causing damage to the crops enclosed by the fence; the defense was that the fence was removed by the road overseer because it obstructed a public road: Held, that under the statute defendants could remove fences, obstructing public roads in use as such in their district, and are not precluded from defending the trespass charged as having been necessarily committed in discharge of the duties of the road overseer, provided the special defenses sufficiently aver the facts. Affirmed.—KURZ V. TURLEY.

KANSAS CITY COURT OF APPEALS.

TELEGRAPH COMPANY — Liability for Failure to Deliver Telegram. — Section 2725, Rev. St. 1889, enacting that a telegraph company shall "provide sufficient facilities at all its offices for the dispatch of the business of the public——and on payment or tender of their usual charges for transmitting dispatches——to transmit the same promptly and with impartiality and good faith, under a penalty, etc." does not impose upon a telegraph company a penalty for its failure or neglect to deliver at the place of its destination, to the person to whom it is addressed, a message which the company has promptly and with impartiality and good faith transmitted over its wires from the place of sending to the place of destination.—DUDLEY V. WESTERN UNION TELEGRAPH CO.

WITNESS—Party to Contract — Death. — In an action by a subcontractor, to enforce a mechanic's lien, the contractor and owner were made parties. Before trial the contractor died. The only parties to the contract sued on were plaintiff and the contractor: Held, the other party to the contract being dead, plaintiff is disqualified as a witness.—CAHILL V. ELLIOTT.